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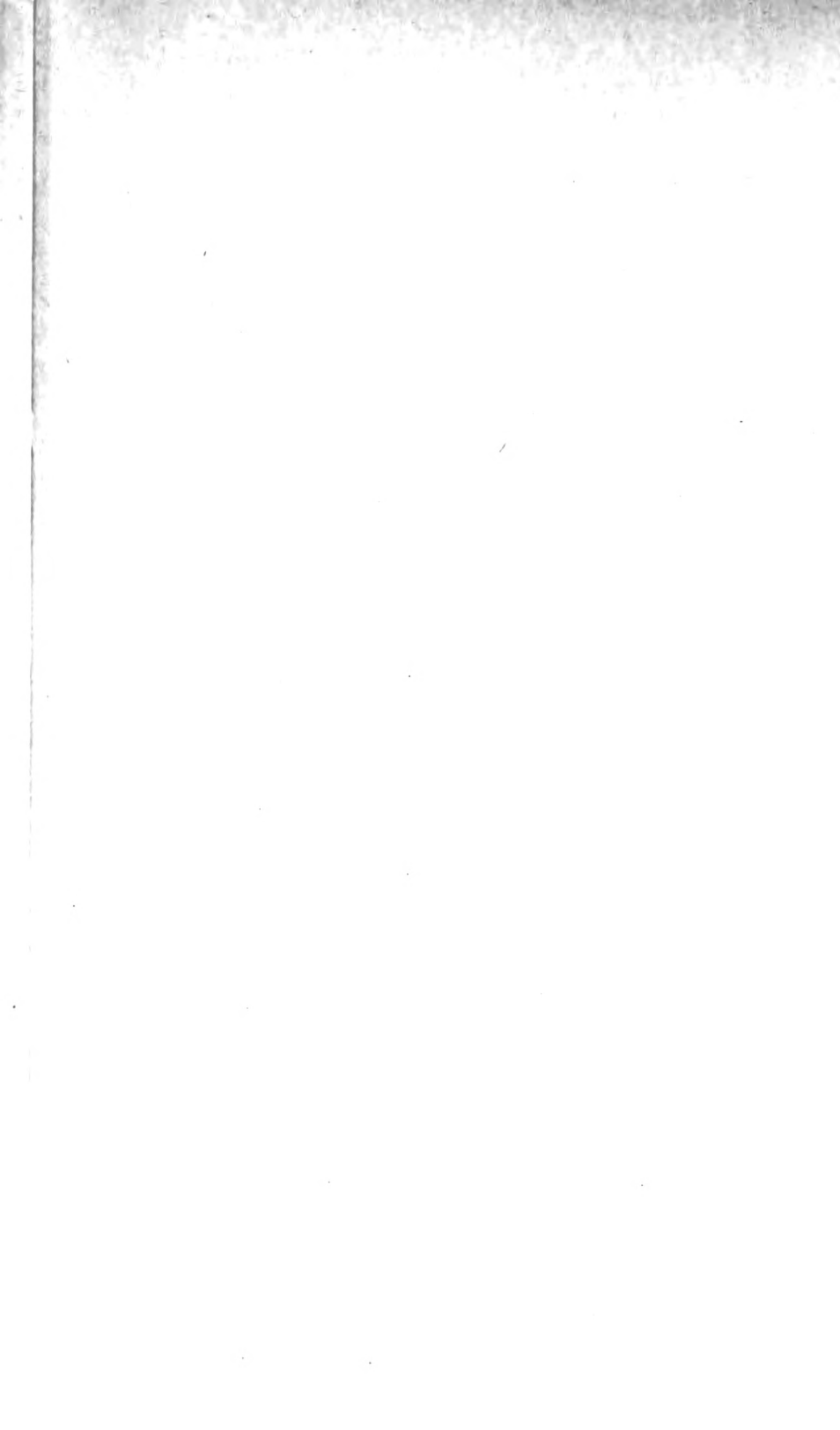
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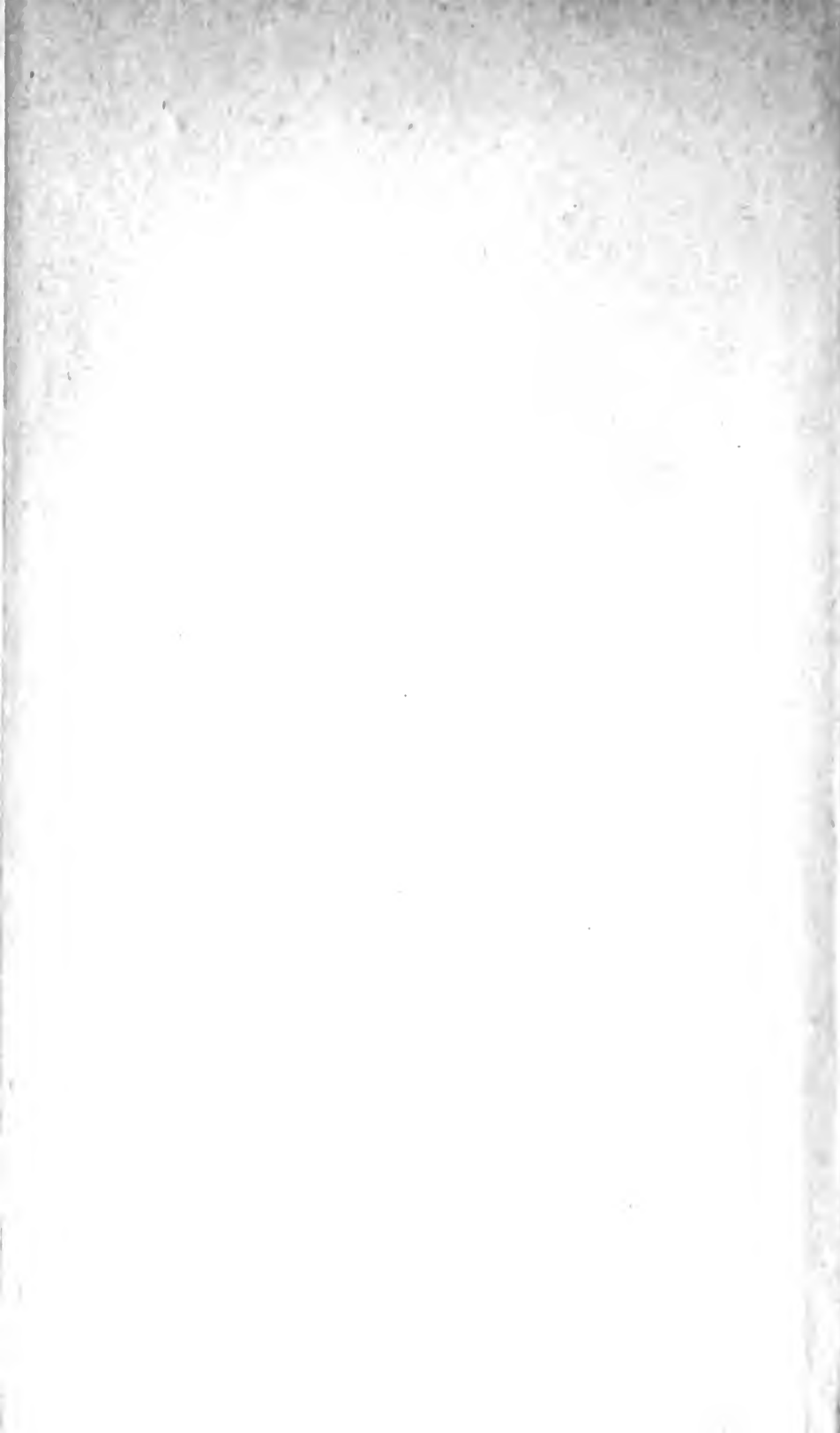
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No. 12736

2667

**United States
Court of Appeals**
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GLOBE WIRELESS, LTD.,
Respondent.

Transcript of Record

**Petition for Enforcement of an Order of the
National Labor Relations Board.**

FILED

MAY 29 1951

PAUL F. O'BRIEN,
CLERK

No. 12736

**United States
Court of Appeals
for the Ninth Circuit.**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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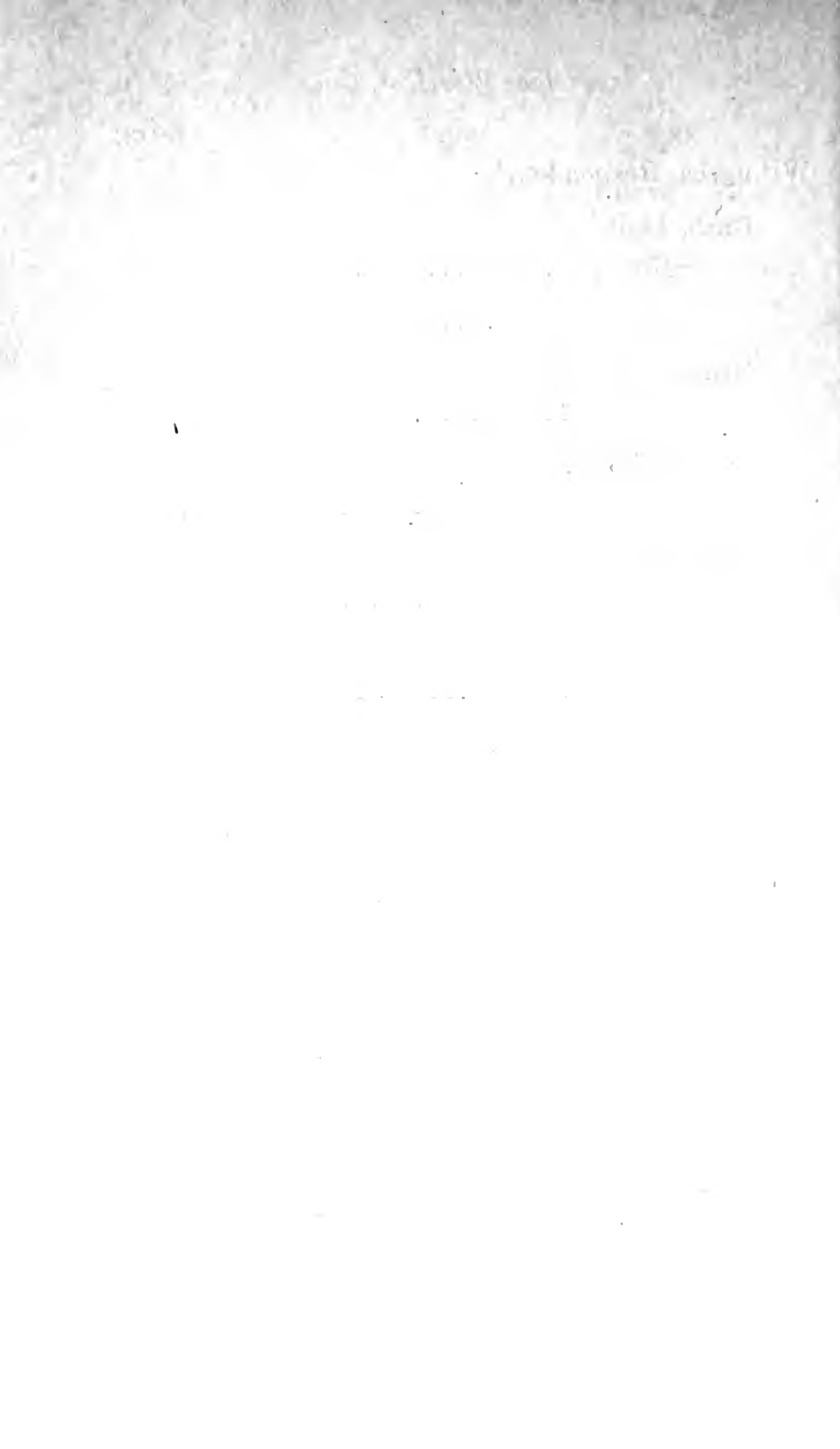
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APPEARANCES

NATHAN R. BERKE,
821 Market St.,
San Francisco, Calif.,

Appearing on Behalf of General Counsel,
National Labor Relations Board.

BROBECK, PHLEGER & HARRISON, by
RICHARD ERNST,
111 Sutter St.,
San Francisco, Calif.,

Appearing on Behalf of Globe Wireless,
Ltd., The Respondent.

GLADSTEIN, ANDERSEN, RESNER & SAW-
YER, by

ALLAN BROTSKY,
240 Montgomery St.,
San Francisco, Calif.,

Appearing on Behalf of Lorraine E. Con-
ger, et al., the Charging Party.

NLRB 501
(10-20-47)

United States of America
National Labor Relations Board

ADDITIONAL CHARGE 13
AGAINST EMPLOYER

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Globe Wireless, Ltd., at 141 Battery Street, San Francisco, Calif., employing approx. 30 workers in wireless communications has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) subsections (1) and (3) of said Act, in that:
2. On or about January 21, 1949, said employer discharged the undersigned solely by virtue of the membership and activities of the undersigned in the American Communications Association, a labor organization.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. (Paragraphs 3, 4 and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number The financial

data filed with the secretary of Labor is for the fiscal year ending A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.
5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g) and (h) of the Act.
6. (Full name of labor organization, including local name and number, or person filing charge): Chas. A. Jones. (Address): 204 Park Street, Redwood City, Calif.
7. (Full name of national or international labor organization of which it is an affiliate or constituent unit): (address):

(By /s/ CHAS. A. JONES,

(Signature of representative
or person filing charge.)

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

240 Montgomery St., S. F. 4,
Attorneys for
Chas. A. Jones.

Subscribed and sworn to before me this 7th day of February, 1949, at San Francisco, as true to the best of deponent's knowledge, information and belief.

/s/ AGNES QUARE,

Notary Public in and for the City and County of San Francisco, State of California.

Do Not Write in This Space

Case No. 20-CA-193

Additional Charge 13

Date filed: 2/16/49.

9(f), (g), (h) cleared

Form NLRB-501
(12-48)

United States of America
National Labor Relations Board

AMENDED CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought: Globe Wireless, Ltd.

Address of Establishment: 141 Battery St., San Francisco, Calif.

No. of workers employed: Approximately 30.

Nature of employer's business: Wireless communications.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a) subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets): On or about January 22, 1949, said employer discharged the undersigned solely because of the latter's participation or alleged participation in concerted activity of a group of employees of the employer protesting the discriminatory discharge of Charles Jones, an employee of said employer.
3. Full name of labor organization, including local name and number, or person filing charge: Lorraine E. Conger.

4. Address: 1941 Taraval St., San Francisco, Calif.
5. Full name of national or international labor organization of which it is an affiliate or constituent unit. (To be filled in when charge is filed by a labor organization).
6. Address of national or international, if any:
7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By LORRAINE E. CONGER,
(Signature of representative
or person filing charge.)

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
240 Montgomery St., San
Francisco, Calif.,
Attorneys for Lorraine E.
Conger.

April 1, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

Do not write in this space.

Case No.: 20-CA-193. (Additional Charge.)

Date filed: April 5, 1949.

Compliance status checked by:

“The foregoing charge is, mutatis mutandis, identical with the charges filed with the Board on April

5, 1949, by Paul J. Guerrero, Violet A. Leach, Jesse E. McLin, Homer E. Mulligan, M. C. Parks, John Gyuresik, and Leslie T. Wheeler, and with the charges filed with the Board on April 4, 1949, by Lillie I. Friend, Albert E. Hinde, Virginia Kelso, R. W. Niemi, Louis Pena, Sylvia Pottle, Bruce Risley, George J. Rosengren, David E. Sheaffer, Pauline G. Smith, and Viola M. Williams."

United States of America

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-193

In the Matter of

GLOBE WIRELESS LTD.

and

LORRAINE E. CONGER, LILLIE I. FRIEND,
PAUL GUERRERO, JOHN GYURCSIK,
ALBERT E. HINDE, CHARLES A. JONES,
VIRGINIA KELSO, VIOLET A. LEACH,
JESSE E. McLIN, HOMER E. MULLIGAN,
RUDOLPH W. NIEMI, MALCOLM G.
PARKS, LOUIS PENA, SYLVIA POTTLE,
BRUCE B. RISLEY, GEORGE J. ROSEN-
GREN, DAVID E. SHEAFFER, PAULINE
SMITH, LESLIE T. WHEELER, VIOLA H.
WILLIAMS.

Individuals.

COMPLAINT

It having been charged by the individuals listed in the caption above that Globe Wireless Lt., 141 Battery Street, San Francisco, California, has engaged in and is now engaging in certain of the unfair labor practices affecting commerce, as set forth in the National Labor Relations Act, 29 U.S.C.A. 141 et seq. (Supp. July, 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board—Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges:

I.

Globe Wireless Ltd., hereinafter called the respondent, is a Nevada corporation engaged in the transmission of international radio communications between the United States, including the Territory of Hawaii, and other countries. Its principal office is located in San Francisco, California, and it maintains branch offices in New York City; Honolulu, T. H.; Seattle, Washington; Los Angeles, California; Washington, D. C., and Shanghai, China. During 1948 the respondent purchased communications equipment valued at approximately \$50,000. About fifty per cent of such equipment was shipped into the state where used from other states of the United States. During the same year, the respondent received revenue in excess of \$250,000 for its serv-

ices in transmitting messages to and from continental United States and other parts of the world.

II.

American Communications Association, affiliated with the Congress of Industrial Organizations, hereinafter called the ACA, is a labor organization within the meaning of Section 2(5) of the Act.

III.

At various times between August, 1948, and January, 1949, inclusive, the respondent, by its officers and agents, while engaged in the operation of its business described above, threatened its employees with discharge or demotion as a penalty for activity by them on behalf of the ACA.

IV.

The respondent, by its officers and agents, while engaged in the operation of its business described above, discharged Charles A. Jones on or about January 21, 1949, and has at all times since refused to reinstate him because of his membership in and activities on behalf of the ACA.

V.

The respondent, by its officers and agents, while engaged in the operation of its business described above, discharged its employees listed below on or about the dates shown, and has at all times since refused to reinstate them because they engaged in concerted activities for the purposes of collective bargaining, mutual aid and protection.

Albert E. Hinde	January 21, 1949
Rudolph W. Niemi	January 21, 1949
Malcolm G. Parks.....	January 21, 1949
Sylvia Pottle.....	January 21, 1949
Bruce B. Risley.....	January 21, 1949
Pauline Smith.....	January 21, 1949
Viola H. Williams.....	January 21, 1949
Lorraine E. Conger.....	January 22, 1949
John Gyuresik.....	January 22, 1949
Virginia Kelso.....	January 22, 1949
Violet A. Leach.....	January 22, 1949
Jesse E. McLin.....	January 22, 1949
Homer E. Mulligan.....	January 22, 1949
Louis Pena.....	January 22, 1949
George J. Rosengren.....	January 22, 1949
David E. Sheaffer.....	January 22, 1949
Lillie I. Friend.....	January 24, 1949
Paul Guerrero.....	January 24, 1949
Leslie T. Wheeler.....	January 24, 1949

VI.

The respondent discharged and refused to reinstate its employees, as set forth in Paragraph V, above, for the additional reason that they were members of and were engaged in activities on behalf of the ACA.

VII.

By its acts set forth in Paragraphs IV and VI, above, the respondent discriminated and is discriminating, in regard to the hire and tenure of employment and terms and conditions of employment of the employees referred to therein, thereby discouraging membership in the ACA, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

VIII.

By its acts set forth in Paragraphs III, IV, V, VI and VII, above, and by other similar acts and conduct, the respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IX.

The acts of the respondent set forth in Paragraphs III, IV, V and VI, above, occurring in connection with operations of the respondent described in Paragraph I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on this 3rd day of June, 1949, issues this Complaint against Globe Wireless Ltd., 141 Battery Street, San Francisco, California, the respondent herein.

[Seal] /s/ ROY O. HOFFMAN,

Acting Regional Director, 20th Region, National Labor Relations Board.

[Title of Board and Cause.]

ANSWER

Comes now Globe Wireless, Ltd. and answers the Complaint filed by the National Labor Relations Board as follows:

First Defense

I.

Globe Wireless, Ltd. admits the allegations of Paragraph I of the Complaint.

II.

Globe Wireless, Ltd. alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs II and IX of the Complaint and on this ground denies generally and specifically, each and all of the allegations of said Paragraphs II and IX.

III.

Globe Wireless, Ltd. denies the allegations of Paragraphs III, VI, VII and VIII of the Complaint.

IV.

Answering the allegations of Paragraph IV of the Complaint, respondent alleges that on January 20, 1949, Charles A. Jones was advised that his work on a new work assignment, which was given him upon his successfully bidding therefor and which required the use of recently installed machines, was not satisfactory in the amount of work completed during a work period and that he was being offered an assignment with a minimum work load and was being directed and instructed to practice on said machines during any work lulls within his working hours so that he could improve his operation of such machines sufficiently to enable him to complete a satisfactory amount of work during a work period. Said Charles A. Jones thereupon was guilty of gross insubordination in that, among other things, (a) he utterly, completely and unconditionally refused to do the work assigned him and stated to his supervisor that he so refused, (b) he utterly, completely and unconditionally refused to improve or increase the amount of work he was completing or to take any action directed to such end and stated to his supervisor that he so refused, and (c) he utterly, completely and unconditionally refused to practice on such machines or to take any other action that might contribute to the

improvement of his operation of such machines and stated to his supervisor that he so refused. Said acts and statements of insubordination were repeated and fully confirmed by him on January 21, 1949, and he was thereupon discharged for insubordination. Respondent alleges that said Charles A. Jones was discharged solely because of insubordination. Said Charles A. Jones was subsequently replaced by a new permanent employee. Respondent alleges that, until the time of said replacement, respondent refused to reinstate said Charles A. Jones solely because of insubordination and that, since the time of said replacement, respondent has refused to reemploy said Charles A. Jones because of said replacement and because of said insubordination, and has refused to employ said Charles A. Jones for no other reason than said replacement and said insubordination. Respondent denies that it discharged or refused to reinstate Charles A. Jones because of his membership in American Communications Association or because of his activities on behalf of American Communications Association or any labor organization, or because of any such activities. Respondent denies generally and specifically, each and all of the allegations of said Paragraph IV of the Complaint that are not specifically admitted or denied in this Paragraph.

V.

Answering the allegations of paragraph V of the Complaint, respondent alleges:

(a) On or about the respective dates stated

after the names of the persons listed below, each of the said persons left his work and refused to perform his work and has, ever since that time, continuously refused to work.

Albert E. Hinde.....	January 21, 1949
Rudolph W. Niemi.....	January 21, 1949
Malcolm G. Parks.....	January 21, 1949
Sylvia Pottle.....	January 21, 1949
Bruce B. Risley.....	January 21, 1949
Pauline Smith.....	January 21, 1949
Viola H. Williams.....	January 21, 1949
Lorraine E. Conger.....	January 22, 1949
John Gyuresik.....	January 22, 1949
Virginia Kelso.....	January 22, 1949
Violet A. Leach.....	January 22, 1949
Jesse E. McLin.....	January 22, 1949
Homer E. Mulligan.....	January 22, 1949
Louis Pena.....	January 22, 1949
George J. Rosengren.....	January 22, 1949
Davied E. Sheaffer.....	January 22, 1949

(b) On or about January 23, 1949, Paul Guerero failed to report for work as scheduled and failed at any time to initiate any advice to respondent of such failure or the reason therefor and, upon his next appearance at his place of work on or about

January 24, 1949, failed and refused and was unable to give any adequate reason for such failures. His supervisor thereupon advised him that he was discharged. On January 24, 1949, respondent notified said Paul Guerrero that the District Manager of the company wanted to review this action and to return him to work if there was not sufficient cause for discharge, and instructed him to call the District Manager to arrange a mutually agreeable time for such review. Said Paul Guerrero failed and refused to meet with respondent's District Manager and failed and refused to report to the office of respondent or to work or to give any reason for his failure to work on January 23, 1949, and has ever since continued in said refusals and failures.

(c) At or about 12:01 a.m., January 24, 1949, Leslie T. Wheeler failed to report to work as scheduled and failed at any time to advise respondent of such failure or the reason therefor and when he next appeared at his place of work at approximately 8:00 a.m. on January 24, 1949, he failed and refused and was unable to give any adequate and substantiated reason for such failures, or any reason. His supervisor thereupon advised him that he was discharged. On January 24, 1949, respondent notified said Leslie T. Wheeler that the District Manager of the company wanted to review this action and to return him to work if there was not sufficient cause for discharge, and instructed him to call the District Manager to arrange a mutually agreeable time for such review. Said Leslie T. Wheeler failed and refused to meet with respondent's District

Manager and failed and refused to report to the office of respondent or to work or to give any reason for his failure to work on January 23, 1949, and has ever since continued in said refusals and failures.

(d) At or about 8:00 a.m., January 24, 1949, Lillie I. Friend reported at her place of work as scheduled and was told that her job was open and was instructed and directed to go to work. She thereupon failed and refused to go to work and left her place of employment and continuously since then has failed and refused to work or to report to work.

(e) Each of said persons named in subparagraphs (a), (b), (c) and (d) of this paragraph V was replaced by a new permanent employee during the continuance of his active refusal to work.

(f) Respondent denies generally and specifically, each and all the allegations of said paragraph V of the Complaint that are not specifically admitted or denied in this paragraph V.

Second Defense

VI.

Respondent discharged Charles A. Jones for cause within the meaning of Section 10(c) of the Act.

Third Defense

VII.

Each of the persons named in subparagraphs (a) and (d) of paragraph V hereof, while he was scheduled for work and present at his place of work, was

offered his work and was instructed and directed to do his scheduled work and thereupon failed and refused to do so and, while such failure and refusal continued, was replaced by a new permanent employee.

Fourth Defense

VIII.

Each of the persons named in subparagraph (a) of paragraph V hereof left his work during the course of his tour of duty and while the radio telegraphic circuit he was employed to operate was open and carrying traffic and offering service to the public in accordance with Respondent's certificate of convenience and necessity under the Federal Communications Act and with the knowledge and intent that such action would prevent Respondent from operating said circuit for radio telegraphic communication until it could find a replacement for him and that the public would thereby be deprived of any communication service through such facility of Respondent until Respondent was able to obtain such replacement. Each of said persons thereby intended to coerce, compel and force Respondent to violate the Federal Communications Act, and did so, and each of the said persons did thereby violate said Act.

Fifth Defense

IX.

Each of the persons named in subparagraph (a) of Paragraph V hereof deserted his work and, upon being instructed to turn to his scheduled work, re-

fused to perform his work in violation of the terms and conditions of the contract of employment under which such person was actually performing work at the time of his desertion of his work.

Sixth Defense

X.

Upon information and belief Respondent alleges that American Communications Association made and filed each and all of the charges upon which the complaint is based.

XI.

Upon information and belief Respondent alleges that said American Communications Association has not complied with the provisions of subsections (f), (g) and (h) of Section 9 of the Act.

Seventh Defense

XII

Paragraph X of the Sixth Defense is incorporated herein by reference as though set forth in full.

XIII.

Upon information and belief Respondent alleges that any and all concerted activities for the purposes of collective bargaining, mutual aid and protection, or for any other purpose, engaged in by the persons named in Paragraph V of the Complaint while employees of Respondent were and are activities of, for and on behalf of said American Communications Association. Said concerted activities, and any and all concerted activities of said American Communi-

ications Association, and the practices of said American Communications Association, its officers and its members, had the intent and the necessary effect of burdening or obstructing commerce and impairing the interest of the public in the free flow of interstate commerce in radio telegraphic communication.

XIV.

Respondent alleges that the acts of said American Communications Association, its officers, agents and its members, including those carried on by the persons listed in Paragraph V of the Complaint, have a close intimate and substantial relief to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening or obstructing commerce and the free flow of commerce in violation of the policies of the National Labor Relations Act.

XV.

Upon information and belief respondent alleges that said American Communications Association, its officers and agents and members, including those whose names are listed in paragraph V of the complaint, have by their acts restrained and coerced those employees of Globe Wireless who have chosen not to become members of said American Communications Association, in their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

other material aid or protection and in their right to refrain from any or all of such activities.

XVI.

Respondent alleges that said American Communications Association, its officers and agents and members, including those whose names are listed in paragraph V of the complaint, have attempted to cause respondent to discriminate against those employees who have chosen not to belong to said American Communications Association in regard to hire or tenure of employment and other terms and conditions of employment.

XVII.

Respondent alleges that said American Communications Association, its officers and agents and members, including those whose names are listed in paragraph V of the complaint, have induced or encouraged the employees of other employers to refuse in the course of their employment to handle messages that were or were destined to be handled by respondent or to perform services with respect to messages that were or were destined to be handled by respondent, with the object of forcing or requiring other employers to cease handling such messages and to cease doing business with respondent in accordance with established practices for the joint handling of messages between points served by respondent and points not served by respondent.

Eighth Defense

XVIII.

No relief can be granted to effectuate the policies of the Act on the basis of the complaint.

Ninth Defense

XIX.

Any relief based upon the complaint will contravene the policies of the Act.

Wherefore, the complaint should be dismissed and the proceedings terminated without any order directed against the Respondent.

Dated: July 2, 1949.

BROBECK, PHLEGER &
HARRISON,

/s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

Attorneys for Respondent
Globe Wireless, Ltd.

State of California,

City and County of San Francisco—ss.

Neil D. Brown, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President of Globe Wireless, Ltd., a corporation, the Respondent named in the foregoing Answer and, as such is authorized to verify said Answer; that he has read the said Answer and knows the contents thereof, and that the same is true of his own knowledge

except as to matters which are therein stated upon information and belief, and as to such matters that he believes it to be true.

/s/ NEIL D. BROWN.

Subscribed and sworn to before me this 2nd day of July, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

Received July 5, 1949, NLRB.

[Title of Board and Cause.]

INTERMEDIATE REPORT

Upon amended charges filed on April 1, 1949, by the individuals named in the caption hereof, herein called the charging parties, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel¹ and the Board, by the Regional Director for the Twentieth Region (San Francisco, California) issued a complaint dated June 3, 1949, against Globe Wireless, Ltd., herein called Respondent, alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act.

¹This term includes particularly counsel appearing at the hearing on behalf of the General Counsel.

Copies of the complaint, accompanied by a notice of hearing, were duly served upon Respondent and the charging parties.

With respect to the alleged unfair labor practices the complaint alleged, in substance, that Respondent: (1) at various times between August 1948 and January 1949, threatened its employees with discharge or demotion as a penalty for their activity on behalf of American Communications Association, herein called the A.C.A., affiliated with the Congress of Industrial Organizations; (2) on or about January 21, 1949, discharged one Charles Jones because of his membership in and activities on behalf of A.C.A., and (3) from January 21 to 24, 1949, discharged the 19 other employees named in the caption hereof because they engaged in concerted activities for the purposes of collective bargaining and mutual aid and protection.

On July 5, 1949, Respondent filed an answer admitting certain allegations of the complaint with respect to the nature of its business, but denying that it had engaged in any unfair labor practices.

Pursuant to notice a hearing was held at San Francisco, California, from July 26 to 30, 1949, before Horace A. Ruckel, the undersigned Trial Examiner duly appointed by the Chief Trial Examiner. The General Counsel, Respondent, and the charging parties were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues, was afforded all parties. The Trial Examiner granted a

motion by the General Counsel, concurred in by counsel for the charging parties, to strike certain portions of Respondent's answer.²

At the conclusion of the hearing the undersigned granted a motion by the General Counsel to conform the pleadings to the proof in formal matters, but reserved ruling on a motion by Respondent to dismiss the complaint. This motion is disposed of by the recommendations hereinafter made. The parties waived oral argument and were granted until August 13 to file briefs and/or proposed findings of fact and conclusions of law with the undersigned. Subsequently, this time was extended by the Chief Trial Examiner to September 19. On this date Respondent filed Proposed Findings of Fact.

Upon the entire record in the case, and from his observations of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a Nevada corporation having its principal office and place of business at San Francisco, California, and maintaining branch offices at New York City, Honolulu, Seattle, Los Angeles, Washington, D. C., and Shanghai, China. It is en-

²The portions which were stricken consisted, in substance, of allegations that the A.C.A. had not complied with Section 9 (f) (g) and (h) of the Act requiring the filing and financial and other reports and non-Communist affidavits.

gaged in the transmission of international radio communications between the United States and other countries. During the year 1948 Respondent purchased communications equipment valued at approximately \$50,000, about 50 per cent of which was shipped into the State where used from other States of the United States. During the same year Respondent received revenue in excess of \$250,000 for its services in transmitting messages to and from continental United States and other parts of the world.

Respondent admits that it is engaged in interstate commerce within the meaning of the Act.

II. The Labor Organization Involved

The A.C.A. is a labor organization admitting to membership employees of Respondent. It is affiliated with the Congress of Industrial Organizations.

III. The Alleged Unfair Labor Practices

A. The Alleged Discriminatory Discharges

1. Charles Jones

Jones first came to work for Respondent on February 22, 1947. At the time of his discharge on January 21, 1949, he was working as an automatic painter operator under the supervision of Leo Bash, chief operator. Before entering Respondent's employ Jones had had about 30 years experience in the communications field, much of it as an automatic printer operator and point to point oper-

ator, although on machines different from those used by Respondent. During the time he was employed by Respondent Jones punched on all the circuits in the operating room, including the Manila and Shanghai units. Most of his work, however, was on the Shanghai circuit to which he was transferred from the Manila circuit, at his own request, shortly after coming to work.

Jones was a member of A.C.A. when he was employed by Respondent, and continued his activities in behalf of that organization thereafter. A previously executed contract between Respondent and A.C.A. expired on August 15, 1948, and no new contract was entered into. The Respondent, however, continued in effect most of the substantive provisions of the contract respecting wages, hours, and working conditions. Jones was a member, along with other employees, of the A.C.A.'s Grievance Committee which conducted negotiations for a new contract and in addition discussed grievances with management in accordance with the procedure outlined in the contract. He was, in addition, one of 8 shop stewards among the approximately 20 union members in Respondent's operating room. Jones' activity in the Union was, of course, well known to Respondent.

In January, 1949, Jones bid for and obtained a transfer to the noon to 8 p.m. watch, starting on January 17. His work assignments on this watch were the usual ones and included the relief of other operators during their lunch periods, and other miscellaneous work until 4:30 p.m. From

that time until the close of the watch at 8 p.m. he punched messages on the Manila circuit. This circuit is financially Respondent's most important one and carries the heaviest traffic. It is busiest during the hours Jones was assigned to it because it covers the close of business in San Francisco, when the greatest number of messages are filed, and the opening of business in Manila when speedy delivery of messages is of prime importance. On Jones' previous watch he had punched for the most part on the Shanghai circuit where speed in punching, though desirable as always, was not of first importance.

On January 19, Bruce, not a member of A.C.A., called Bash's attention to a form that Jones was using in transmitting certain messages on the Manila circuit which was different from the form currently used by Respondent. Bash immediately took the matter up with Jones and directed him to use the correct form thenceforth, which Jones did. On the following day, January 20, Jones re-opened the discussion about the form with Bash, and remarked that he had concluded that Bash was going to "pick (his) work to pieces" and that he did not intend to put up with it. Later the same day, Bash and Jones had another conversation in which Jones called Bruce a "fink" and objected to her having gone to Bash instead of directly to him about the form he had used. Bash objected to the application of this term to Bruce and a discussion took place during which Jones accused Bash of having called him a Communist, to which Bash replied that he only called Jones a "fellow traveler." The argu-

ment was heated and blows were narrowly averted.

Just prior to Jones' time to punch on the Manila circuit that afternoon, James McDowell, Jones' immediate supervisor, reported to Bash that unless Jones improved his speed McDowell would have to have an additional operator assigned to that circuit. Bash then approached Jones and told him that his work was not satisfactory so far as its quantity was concerned, that he would have to punch faster, and that, instead of transmitting on the Manila circuit that evening, he was being assigned to the Shanghai circuit on the same watch for about 2 weeks³ where he was to practice punching during his idle moments. Jones, according to his own testimony, told Bash that he considered the order to practice an insult, and that he was punching as fast as he could and keep up with his usual standard. Upon Bash's asking him if he would comply with the order to practice while on the Shanghai circuit Jones replied flatly that he would not. Bash left Jones and prepared a report of the incident to James McPherson, assistant manager, while Jones took over the Shanghai circuit. Jones admitted, while testifying, that he did not practice while on the circuit, as Bash had directed him to do.

Jones' place on the Manila circuit was taken by Malcolm Parks, chairman of the shop committee,

³Jones' testimony is silent as to the length of time he was to spend on the Shanghai circuit, and the finding that it was for about 2 weeks is based upon Bash's testimony, which the undersigned credits on this point.

for the A.C.A.,⁴ who was transferred for that purposed from the Shanghai circuit.

On the following morning, January 21, Bash conferred in person with McPherson, told him that he could not "take it" any longer from Jones, and that if he were not disciplined he, Bash, would resign as chief operator. Later during that morning, upon reporting for work, Jones was called to McPherson's office where McPherson asked Jones if it was true that he refused to practice punching on the Shanghai circuit as ordered by Bash, and Jones replied that it was, repeating as the reason for his refusal that the order was intended only as an "insult." Jones, together with Rudolph Niemi, who was present as the former's representative,⁵ told McPherson that Respondent was about to discharge the wrong man, that Bash was causing all the "trouble" in the operating room, and that he should be discharged instead of Jones. McPherson then in

⁴This finding is based upon Bash's testimony that upon transferring Jones to the Shanghai circuit he told him to tell Parks to come over to the Manila circuit. The testimony of both Jones and Parks is silent on this point, but it seems a reasonable inference that Bash's order was complied with in this respect, and that Parks filled in for Jones on the Manilla circuit. There was no difference in pay between the two circuits.

⁵Respondent's practice was to permit an employee with a grievance to be represented by some other employee in lieu of a union representative, as had been the case before the expiration of the 1947 contract.

formed Jones that his employment was terminated.

Conclusions as to Jones' Discharge

Respondent advances as its reason for discharging Jones that he was insubordinate in refusing to practice on the Shanghai circuit as ordered to do by Bash. The General Counsel's contention is that he was discharged because of his union activity. If this contention is to be upheld it would have to be on the theory that Jones' refusal to comply with Bash's order was only the pretext for his discharge, or that it was intended to provoke Jones into a breach of plant discipline. The seriousness of the refusal, in and of itself, as affecting discipline can hardly be denied.

There is no substantial evidence in the record that Bash's direction to Jones was prompted by anything else than legitimate business considerations. Jones' own reason for his refusal to obey Bash's instructions was, and is, simply that he was punching at as great a speed as was consistent with accuracy, and that he was "insulted" by Bash's order to practice during his spare time on the Shanghai circuit. Bash's reasonableness in so instructing Jones is not in issue, except to the extent that a clearly unreasonable direction might argue that Respondent was motivated by other considerations, to wit, Jones' activity on behalf of the A.C.A. However, it should be borne in mind that Jones had been on the noon to 8 p.m. watch, where his time was devoted mainly to the important Manila circuit, for only a few days, and that it might reasonably be expected that his punching would not

be as satisfactory as it had been on his previous watch where he had worked principally on the less important Shanghai circuit. Moreover, Jones' transfer to the Shanghai circuit was stated to be for only 2 weeks, and it in no sense represented a demotion. If Bash meant to discriminate against Jones because of his activity in behalf of the A.C.A. it is hardly likely that he would have transferred Parks from the Shanghai circuit to take Jones' place on the Manila circuit. Parks was shop chairman for the A.C.A. and, if anything, more active on behalf of that organization than Jones.

It is clear from the record that Bash, whether correctly or not, viewed the A.C.A. as an organization influenced by Communists, and Jones himself as a "fellow traveler."⁶ Respondent similarly, it is evident from the entire record, did not intend to deal with the A.C.A. if it could be avoided, or at least until it had filed the affidavits required by the Act. It is manifest that these considerations led to a very considerable hostility by Bash toward Jones, and it is conceivable that they may have influenced Respondent in discharging him. It would seem as much beside the point, however, to speculate to what extent they may have motivated Bash, as it would be to speculate whether Jones or the A.C.A. may have intended to disrupt and impede Respondent's operations so as to render it more amenable to recognizing the A.C.A. as the employees' bargaining representative, as it had previously been.

⁶Bash's antipathy to the A.C.A. is hereinafter more fully discussed.

The fact is that Jones flatly and admittedly disobeyed an order which on its face was not only legitimate but reasonable. Neither the order itself nor Respondent's enforcement of it by discharging Jones is shown by substantial evidence to have been motivated by Respondent's dislike of the A.C.A. or Jones part in its activities, and the undersigned finds that they were not.

2. The Strike in the Operating Room and The Discharge of the Strikers

Jones' discharge by Respondent had an immediate repercussion. Jones went from McPherson's office to a meeting of the A.C.A. scheduled at 1:30 p.m. for members on the 4 p.m. to midnight shift. At this meeting the members voted to protest Jones' discharge to management. Accordingly, at approximately 4:30 p.m., Jones and Parks returned to the operating room where Parks demanded of Bash that Jones be reinstated. Bash replied that he himself had not discharged Jones. The A.C.A. members then on watch, whose names are included in the caption hereof, left their circuits and joined the group consisting of Bash, Jones, and Parks. A general discussion followed during which Bash was told that he "couldn't get away with" discharging Jones. Bash told the operators to go back to their circuits, but instead they sat around in the operating room leaving the circuits unmanned. Bash informed McPherson of the situation and McPherson took it up with Boatwright, Respondent's president. Shortly after 5 p.m. Bash, upon

orders from McPherson, again asked each of the operators to return to his circuit. Each replied, in substance, that he would do so only when Jones was reinstated in his job. In accordance with McPherson's instructions Bash then told the group that they were discharged.

Following this the employees went to McPherson's office. In reply to McPherson's inquiry as to whether they were going to return to work, and his statement that their jobs were waiting for them, he was told, as Bash had been, that they would not work until Jones was put back. During the conversation the employees urged that Respondent discharge Bash, instead of Jones, which McPherson refused to do, again urging them to return to work. The employees repeated their demand that Jones be reinstated as a condition of their resuming work, and McPherson told them that they were discharged.

Another meeting of the A.C.A. took place that evening, attended by those members on the 8 a.m. to 4 p.m. and midnight to 8 a.m. watches, as well as those employees on the 4 p.m. to midnight watch who had just been discharged. It was decided that another protest would be lodged with management by the night shift during the change of watch. Shortly after midnight Parks, this time accompanied by Albert Hinde, one of the previously discharged operators, approached Bash and the events of the afternoon repeated themselves. The A.C.A. operators on the night watch left their circuits and joined the group around Bash. Parks, as spokesman, repeated the protest as to Jones' discharge,

and Bash answered that the matter was out of his hands. The operators made it clear that none of them would return to work until and unless Jones was reinstated. Upon Bash's failure to give any such assurance, the operators sat around the operating room as had the group in the afternoon. Respondent manned some of the circuits with supervisors and a few operators from the day shift. Somewhat later, Bash told the group of operators that they were discharged and ordered them to leave the premises, which they did.

3. The Discharge of Guerrero, Wheeler, and Friend^{6a}

(a) Paul Guerrero

On Saturday evening, January 22, the day following the above events, Paul Guerrero, an operator on the day watch, had a friend telephone the operating room that he could not report to work at 8 a.m. Sunday, January 23, his next day to work, because of illness. When Bash came on duty Sunday afternoon he telephoned Guerrero to confirm the reason for his absence and was told by Guerrero that he had a cold. Bash told him to report for duty immediately and that he would be sent home if Bash was satisfied he was sick. Guerrero, however, did not report for duty until 8 a.m. on Monday, January 24. Upon his arrival Bash asked Guerrero for a doctor's certificate attesting his

^{6a} Guerrero and Wheeler were off duty on Friday, January 21.

illness the previous day, and when Guerrero stated that he had none Bash discharged him.

The undersigned finds it unnecessary to discuss the evidence as to whether a doctor's certificate was generally required of employees when absent because of sickness. Guerrero was an evasive and unconvincing witness, and the undersigned does not regard his testimony that he was sick as credible. He admitted while testifying that he was at the A.C.A. meeting the evening before his claimed illness of Saturday, that the telephone call to the operating room at Saturday evening was made from his bedside, and that he was not too sick to have telephoned himself, stating that he didn't know why he had not done so except that it was more "convenient" to have a friend call.

It is likely that Guerrero wished to appear to support the other members of the A.C.A. in their protest by not reporting for work, and that his illness was only diplomatic. But whatever Guerrero's motives, Bash was justified in believing that he was feigning illness, and that he was aligning himself with his fellow A.C.A. members in going on strike.

(b) Leslie Wheeler

On Sunday evening, January 23, Bash telephoned Leslie Wheeler, an operator on the midnight to 8 a.m. watch. Bash's testimony is that he asked Wheeler whether he was coming to work that evening as usual, urging him to do so, and that Wheeler said that he would be in. Wheeler's testimony is that Bash told him, in effect, that he was discharged

along with the others. The undersigned finds that Bash's testimony on this point is in accord with the facts, and that Wheeler should have understood that his job was open to him if he wanted it, but that instead he preferred to support his fellow employees. There would seem to have been no point in Bash's telephoning Wheeler unless it was for the purpose of asking him to come to work. Moreover, both Bash and Wheeler testified that the former reminded Wheeler that he was colored, and "had two strikes on him" for this reason. There seems no reason to doubt Bash's testimony that he meant it would be more difficult for Wheeler than for other employees to obtain another job, and is consistent with Bash's urging him to keep the one he had.

Wheeler, however, appears to have changed his mind and showed up in the operating room at 8 a.m. on Monday, at the end of his usual watch, about the same time that Guerrero and Lillie Friend, an operator whose discharge is next discussed, arrived. He was met by Bash who reminded him that he was supposed to have reported at midnight on his circuit. The record is silent as to what Wheeler responded. Bash, however, told Wheeler he was discharged.⁷

⁷A few days later, while on the picket line, both Guerrero and Wheeler received telegrams from Respondent saying that it wished to review the two discharges, and requesting them to see McPherson. Both ignored the invitation.

(c) Lillie Friend

At 8 a.m. on Monday morning, January 24, Friend, an operator on the day shift, reported for her first scheduled watch following the happenings of the previous Friday. As has been stated, she arrived at the operating room at the same time as Guerrero and Wheeler. Bash asked Friend to go to work and a conversation ensued in which Friend accused Bash of being unreasonable in having discharged Jones and the other operators, and made it plain that she supported the others in their protest. Bash told her that she, too, was discharged.

Conclusions

It is abundantly clear from the record that the concerted action of the charging parties excepting Jones, in refusing to perform their work until Jones was reinstated, constituted a strike. Inasmuch as Jones' discharge has been found not to have been occasioned by his activities on behalf of the A.C.A. but by legitimate business reasons, it follows that the strike of the other employees in protest was not an unfair labor practice strike. It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that Respondent has filled the strikers' jobs with other and permanent employees. In these circumstances, and under familiar decisions of the Board, Respondent is not obligated now to reinstate the strikers.

B. Other Alleged Interference, Restraint,
And Coercion

Sylvia Pottle was a service clerk on the 4 p.m. to midnight shift, and one of those who participated in the protests of Jones' discharge on January 21. Shortly after 5 o'clock that afternoon, after the group surrounding Bash had broken up, Bash followed Pottle and Pauline Smith, a traffic clerk, to the locker room and engaged the former in conversation. Bash, according to Pottle's testimony, supported in all essentials by that of Smith, told Pottle that he "felt terrible" about the incidents of that afternoon, but that she was "backing the wrong union," to which Pottle replied that she did not think so. Bash went on to say, according to Pottle, that Respondent had "to get rid of the Communists," that the A.C.A. would never come back into the plant, and that if Pottle was wise she would get out of the A.C.A. "while the getting was good." Bash testified that he did not recall having this conversation. The undersigned found Pottle and Smith to be credible witnesses, and accepts their testimony as true.

Both Pottle and Bash testified that the latter telephoned Pottle on the night of January 23 during which Bash read to her his report to McPherson previously referred to, describing Jones' recalcitrance, and sought her approval of it. According to Pottle the conversation lasted 40 minutes. She testified to it, in part, as follows:

Q. Well, as best you recall it, what he said and what you said.

A. . . . He says, "If I knew . . . that this

letter would have caused such a bombshell," he says, "I never would have submitted it in the first place."

Q. What did you say to that?

A. I said, "Leo, that is the trouble with you, you are so hotheaded, you do things before you think." I says, "That is what has been the trouble right along." He said, "I know it," he said, "I realize that," and he says, but he says, "It just had to come to a head sometime"

. . . "Well," I says, "I think I have a general idea of what it was all about, I think the Company was going to start with Chuck Jones and go right down the line."

He says, "You have a general idea."

Bash, although admitting while testifying that he told Pottle that the A.C.A. should have signed the non-Communist affidavits required by the Act, and otherwise criticized the A.C.A., stated that he did not recall having said that the trouble "had to come to a head sometime," and denied that he said in response to Pottle's statements concerning starting the discharges with Jones, that she "had the general idea."

The entire record shows Bash to be of an excitable and undiplomatic temperament, albeit the undersigned did not find him generally unreliable as a witness. The statements attributed to him by Pottle who impressed the undersigned favorably, are in keeping with his excitability, his dislike of

the A.C.A., and his willingness to use any stigma to beat a dogma. The undersigned finds that he made the statements in substance as testified to by Pottle.

Nevertheless, the undersigned does not find Bash's statements to Pottle either in the locker room or over the telephone to be, in the circumstances of this case, violative of the Act. His statement that Pottle should get out of the A.C.A. "while the getting is good," is equivocal and does not, in the undersigned's view, constitute or imply a "threat of reprisal or force or promise of benefit" proscribed by Section 8 (c) of the Act.

With respect to his telephone conversation with Pottle, his statement that she "had (the) general idea" was in acquiescence to Pottle's own suggestion that it was the Respondent's intention to discriminate against A.C.A. members generally. It has been found above that such was not, in fact, Respondent's purpose in discharging Jones, and while this does not in the usual circumstances exculpate a supervisor in making a statement to that effect, whether true or not, it does tend to emphasize the fact that the suggestion that Jones was discriminated against did not originate with Bash, but with Pottle. He finds that Bash's statements to Pottle were not violative of the Act.⁸

⁸In the same category are other statements of Bash which, although hostile to the A.C.A., do not contain a threat of reprisal or force, or promise of benefit, such as those testified to by Lorraine Conger and Daniel Scheaffer, to the effect that if they insisted on tying themselves to "the Communist kite" they "could sink with it." The record reflects various statements by Bash of this nature.

Conclusions of Law

1. American Communications Association, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent, Globe Wireless, Ltd., is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. Respondent, Globe Wireless, Ltd., has not engaged in any unfair labor practices within the meaning of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the complaint herein be dismissed.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a

brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefore must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 28th day of October, 1949.

/s/ HORACE A. RUCKEL,
Trial Examiner.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS TO INTER-
MEDIATE REPORT OF THE TRIAL
EXAMINER

Now comes Globe Wireless Ltd., Respondent in the above entitled matter, and files the following exceptions to the intermediate report dated October 28, 1949, with the National Labor Relations Board.

Respondent asserts that the factual conclusions stated in III(A) of the Trial Examiner's report are correct, as is his conclusion that the conversations referred to III(B) involved no illegal element. It further asserts that the record fully supports his conclusion that Respondent has engaged in no unfair labor practices within the meaning of the Act.

However, Respondent files this statement of exceptions to the Trial Examiner's report in order to preserve its rights in view of the provisions of Section 203.46(b) of the Rules and Regulations of the Board. The intermediate report fails to include findings of facts, required from the record, that further support the conclusions of the Trial Examiner. It also includes statements in the findings of fact somewhat suggestive of impropriety in Respondent's actions and that are erroneous and without support in the record; these errors are immaterial and not prejudicial so long as the conclusions of the intermediate report are sustained. We call

these errors to the attention of the Board so that it will be aware of the true facts should exceptions to the conclusions of the Trial Examiner be filed with the Board. There are also other errors, immaterial and not prejudicial if the Board does not reconsider the conclusions of the intermediate report, but that may be of significance should such reconsideration be necessary.

The following statement of exceptions is therefore in the nature of further support for the conclusions of the intermediate report and is to indicate to the Board additional reasons why the conclusions should be adopted by the Board.

I.

Exceptions With Respect to Findings Made by the Trial Examiner

* * *

4. Respondent excepts to part of the finding (p. 5, lines 23 to 25) reading as follows:

“It is clear from the record that Bash, whether correctly or not, viewed the A.C.A. as an organization influenced by Communists, and Jones himself as a ‘fellow traveler.’⁶ Respondent similarly, it is evident from the entire record did not intend to deal with the A.C.A. if it could be avoided, or at least until it had filed the affidavits required by the Act. It is manifest that these considerations led to a very considerable hostility by Bash toward Jones, and it is conceivable that they may have influenced

Respondent in discharging him. It would seem as much beside the point, however, to speculate to what extent they may have motivated Bash, as it would be to speculate whether Jones or the A.C.A. may have intended to disrupt and impede Respondent's operations so as to render it more amenable to recognizing the A.C.A. as the employees' bargaining representative, as it had previously been."

"6Bash's antipathy to the ACA is hereinafter more fully discussed."

and the failure to find, instead:

"It is clear from the record that Bash, whether correctly or not, viewed the 1949 A.C.A. organization as dominated by the Communists, and Jones himself as a 'fellow traveler' and that Bash had a burning hatred of Communists of all types and descriptions, without any relation to their being in or outside of labor organizations.⁶ It is manifest that these considerations led to a very considerable hostility by Bash toward Jones; however such feeling was not because of Jones' membership in or activities on behalf of the A.C.A., Bash having long been an active A.C.A. member who had been discharged by Mackay for A.C.A. activity. It is further clear that Respondent was at this time refusing to deal with the A.C.A. until certification by the Board but was advising its employees that they were entirely free to engage in any legitimate union activity. It is

conceivable that union membership or activity might have influenced Respondent in discharging Jones. It would seem as much beside the point, however, to speculate to what extent they may have motivated Bash, as it would be to speculate whether Jones or the A.C.A. may have intended to disrupt and impede Respondent's operations so as to render it more amenable to recognizing the A.C.A. as the employees' bargaining representative, as it had previously been. The examiner refused to permit Respondent to introduce evidence as to this matter and in connection therewith Respondent offered to prove that the A.C.A. officials had admitted facts showing it was not the choice of the majority in the appropriate bargaining unit including the San Francisco operating room."

"⁶Bash's antipathy to the Communists and his feeling toward the 1949 A.C.A. is hereinafter more fully discussed."

5. Respondent excepts to part of the finding of the Examiner (p. 6, line 50, and p. 7, lines 1 through 5) reading as follows:

"When Guerrero stated that he had none, Bash discharged him," and "It is likely that Guerrero wished to appear to support the other members of the A.C.A. in their protest by not reporting for work, and that his illness was only diplomatic. But whatever Guerrero's motives, Bash was justified in believing that he was feigning illness, and that he was aligning

himself with his fellow A.C.A. members in going on strike."

and to the failure to find, instead:

"When Guerrero stated that he had none, Bash advised him that he was discharged. Guerrero thereupon left the operating room and then joined, for the first time, the group on strike. Thereafter Guerrero failed and refused to accept the request of McPherson, Bash's superior, that Guerrero meet with McPherson to review the matter of such discharge and indicating Guerrero would be returned to work if sufficient ground for discharge did not exist." And, "Bash was justified in believing that Guerrero was not ill and was not truthful in giving illness as a reason for not being at work, and Bash did so believe when he told Guerrero that he was discharged. Guerrero did not join his fellow A.C.A. members in the strike until after Bash advised him that he was discharged."

6. Respondent excepts to part of the finding of the Examiner (p. 7, lines 27 through 33) reading as follows:

"Wheeler, however, appears to have changed his mind and showed up in the operating room at 8 a.m. on Monday, at the end of his usual watch, about the same time that Guerrero and Lillie Friend, an operator whose discharge is next discussed, arrived. He was met by Bash who reminded him that he was supposed to have

reported at midnight on his circuit. The record is silent as to what Wheeler responded. Bash, however, told Wheeler he was discharged.⁷

“⁷A few days later, while on the picket line, both Guerrero and Wheeler received telegrams from Respondent saying that it wished to review the two discharges, and requesting them to see McPherson. Both ignored the invitation.”

and to the failure to find, instead:

“Wheeler, however, showed up in the operating room at 8:00 a.m. on Monday at the end of the watch that he had advised Bash he would come in to cover. He came in at about the same time that Guerrero and Lillie Friend arrived. He was met by Bash who reminded him that he was supposed to have reported at midnight on his circuit. Wheeler responded evasively and gave no reason for his failure to have reported. Thereupon Bash told Wheeler he was discharged. Wheeler thereupon left the operating room and then joined, for the first time, the group on strike. While on the picket line that afternoon he was handed a telegram from Respondent requesting him to see Bash’s superior, McPherson, to go over the matter of discharge for the purpose of returning him to work if there was not good cause for discharge. Wheeler ignored this invitation.

7. Respondent excepts to part of the finding of the Examiner (p. 7, lines 41 to 44) reading as follows:

“Bash asked Friend to go to work and a conversation ensued in which Friend accused Bash of being unreasonable in having discharged Jones and the other operators and made it plain that she supported the others in their protest. Bash told her that she too was discharged,”

and to the failure to find, instead:

“Bash asked Friend to go to work. She then responded at length in discussion of the discharge of Jones, Bash replied by merely indicating that her job was there and her work was there to be performed. She left the operating room after Wheeler and Guerrero were each told that he was discharged. She joined the picket line without having been told she was discharged and did not receive a telegram like those sent Guerrero and Wheeler.”

8. Respondent excepts to part of the finding of the Examiner (p. 8, lines 8 through 22) reading as follows:

“Sylvia Pottle was a service clerk on the 4 p.m. to midnight shift, and one of those who participated in the protest of Jones’ discharge on January 21. Shortly after 5 o’clock that afternoon, after the group surrounding Bash had broken up, Bash followed Pottle and Pauline Smith, a traffic clerk, to the locker room and engaged the former in conversation. Bash, according to Pottle’s testimony, supported in all essentials by that of Smith, told

Pottle that he 'felt terrible' about the incidents of that afternoon, but that she was 'backing the wrong union,' to which Pottle replied that she did not think so. Bash went on to say, according to Pottle, that Respondent had 'to get rid of the Communists,' that the A.C.A. would never come back into the plant, and that if Pottle was wise she would get out of the A.C.A. 'while the getting was good.' Bash testified that he did not recall having this conversation. The undersigned found Pottle and Smith to be credible witnesses, and accepts their testimony as true."

and to the failure to find, in lieu of the last sentence quoted above, the following:

"While Pottle and Smith were witnesses entitled to considerable credibility, their recollection as to details was not precise and Pottle particularly, was inclined to generalizations and to coloring testimony in her favor. In view of the denial to the Respondent of the use of the deposition in preparation for the hearing and in view of the availability to the General Counsel of statements given by Bash and others in advance of the hearing and before the issues had jelled and in view of Bash's credibility in general and the failure of the General Counsel to indicate that any contrary expression had been made in Bash's previous statement to the representatives of the General Counsel's office, and in view of the presence of Miss Smith at

the hearing while Miss Pottle was testifying over the objection thereto by Respondent, it is concluded that the statements, if made, were not unlawful and are not admissible as evidence in view of Section 8 (c) of the Act and, at least, in so far as this proceeding is concerned, were not made."

9. Respondent excepts to part of the finding of the Examiner (p. 9, lines 2 and 3) as follows:

"The undersigned finds that he made the statements in substance as testified by Pottle."

and not finding, instead, with respect to the telephone conversation of January 23 (see p. 8, line 24 through line 3 of page 9 and lines 13-22 of page 9):

"Pottle testified that the gist of this conversation was an apology from Bash to Pottle in which he was telling her that he was sorry that the matter had been precipitated. The record shows that in no way either was it an attempt, or had it any tendency, to interfere, restrain or coerce anyone, in exercising the rights guaranteed under Section 7. It was a statement of views in no way even suggesting any threat of force or reprisal for carrying on any action or any promise of reward for refraining or withdrawing from such action. The statements, if made, were not unlawful and are not admissible as evidence in view of Section 8(c) of the Act and so it is concluded they were not made."

10. Respondent excepts to part of the finding of the Examiner (p. 8, line 61, to p. 9, line 3 and p. 9, lines 13 to 22, etc.), reading as follows:

“The statements attributed to him by Pottle who impressed the undersigned favorably, are in keeping with his excitability, his dislike of the A.C.A., and his willingness to use any stigma to beat a dogma. The undersigned finds that he made the statements in substance as testified to by Pottle. * * *

“With respect to his telephone conversation with Pottle, his statement that she ‘had (the) general idea’ was in acquiescence to Pottle’s own suggestion that it was the Respondent’s intention to discriminate against A.C.A. members generally. It has been found above that such was not, in fact, Respondent’s purpose in discharging Jones, and while this does not in the usual circumstances exculpate a supervisor in making a statement to that effect, whether true or not, it does tend to emphasize the fact that the suggestion that Jones was discriminated against did not originate with Bash, but with Pottle. He finds that Bash’s statements to Pottle were not violative of the Act.”

and the failure to find in lieu of the foregoing, as follows:

“Bash, too, was highly critical of all Communists and apparently of the opinion that the A.C.A. leadership was controlled by the Communists. In this conversation, Bash expressed

his opinion that unions were a good thing, that the A.C.A. had made a mistake in not filing the Communist affidavits and that it would have been recognized if it had filed such affidavits and stated that he was unhappy that his action leading to the discharge of Jones had led to the 'sitdown strike' and exhibited a deep regret that his action had led to it. But in this conversation he in no way sought to coerce, interfere with or restrain Pottle in her actions or to threaten Pottle with force, threat of reprisal or force or promise of benefit. Bash categorically denied telling Pottle she was correct in her thought that Respondent was going to go down the line starting with Jones. There is no evidence as to what this meant.

"In view of the direct conflict in the testimony as to whether Bash confirmed a statement by Pottle that she thought Respondent was 'going to start with Chuck Jones and go right down the line' and giving consideration to the equivocal nature of this statement, particularly in view of the finding that Jones was discharged for insubordination in refusing to improve the quantity of his work, and in view of the availability of statements of witnesses, including Bash, to the General Counsel and the unavailability of depositions to counsel for Respondent, there is no substantial evidence that Bash made any statement to Pottle that Respondent had an intention to discriminate against A.C.A. members generally."

II.

Exceptions With Respect to Relevant Findings
The Examiner Failed to Make

Respondent files the following exceptions to the report of the Examiner, raising thereby his omissions to make findings as to detailed and ultimate facts that are fully established by the record and that provide further support for the Examiner's conclusions of fact accepted by Respondent and his conclusions of law. Exception is hereby taken to the Examiner's failure to include in his findings the following:

1. Bash had for many years been an active and militant member of the A.C.A., being one of the employees involved in the Mackay strike of October, 1935, and was one of the four striking operators in San Francisco who refused to return to work at the breaking of the Mackay strike on October 8 and who were eventually returned to work with Mackay, years later, when the Board's order (1 N.L.R.B. 201) was ordered enforced by the Supreme Court, 304 U. S. 333. Bash remained a member of the A.C.A. until he took a withdrawal card upon his being promoted to the position of Chief Operator with Respondent in the latter part of September, 1947.

* * *

3. When Bash asked Jones to practice, Bash met Jones and discussed the matter with him in a place where no one could overhear the criticism

of Jones. In so doing, Bash used more tact and exercised more consideration for Jones than he frequently did in dealing with employees, for the record shows that Bash, without having had any intention of creating a scene or of embarrassing Jones, might well have "roared" the order to practice aloud in the operating room. This would have meant that the pro-A.C.A. and the anti-A.C.A. factions would have heard it.

* * *

6. The charging parties who deserted their circuits at approximately 4:30 p.m. on January 21 and at approximately 12:30 a.m. on January 22, did so after they had in the routine fashion relieved their predecessors on watch and taken over the circuits for their eight-hour watch. Their subsequent desertion, during their active time on watch, was in direct and flagrant violation of the rules of the respondent. These rules had been established, and carefully publicized to Respondent's employees, without regard to possible concerted activity, protected or unprotected, and for the purpose of providing for efficient operations of the company and the continuous manning of its circuits as required by law and for the convenience of the public using Respondent's public utility services. In August, 1948, the A.C.A. group within the employ of Respondent deserted their circuits and prevented their operation while the group sought to obtain assurances that the employer would sign a new agree-

a paid international representative of the A.C.A., asked for their pay checks while Respondent was advising the group that all their jobs were there available for them, but that Jones would not be reemployed or Bash discharged; the employees thereby terminated their employment with Respondent.

11. In view of the public utility character of Respondent's business and the nature of the work stoppage and the violation of non-discriminatory rules by each one participating therein, the action of the employees who went on strike was not concerted activity within the protection of Section 7 of the Act.

12. Guerrero and Wheeler each quit his job when he failed and refused to respond to the invitation from Respondent for the review of the matter of Bash's telling him that he was discharged.

13. The Globe employees other than Jones involved in this proceeding were engaged in concerted activity having the unlawful purpose of seeking to require respondent to discriminate in favor of Jones because of his membership in the A.C.A. and thus to encourage membership in the A.C.A. and to discourage membership in the rival organization and having the unlawful purpose of compelling Respondent to interfere with, restrain and coerce the employees who opposed the A.C.A. in their exercise of their right to remain outside of the A.C.A. or to join a rival labor organization.

III.

Other Exceptions to the Intermediate Report And to the Proceedings

1. Respondent excepts to the rulings of the Regional Director and the Trial Examiner denying Respondent's applications for subpoenas and denying Respondent's requests for the taking of depositions.

2. The Examiner erred in striking the Sixth, Seventh, Eighth, and Ninth defenses of Respondent's answer.

3. The Examiner erred in considering the allegations of unfair labor practices incorporated in paragraphs III and VI of the complaint and in considering the sections of paragraphs VII and VIII of the complaint in so far as they refer to and were based upon paragraphs III and VI of the complaint.

4. The Examiner erred in considering the matters covered by Section III(B) of the intermediate report. There is no allegation in the complaint that any of the incidents referred to in such section constituted an unfair labor practice. No charge, on which this case is based, asserts that any such incident or any similar incident constituted an unfair labor practice; such charges refer only to entirely different facts and alleged unfair labor practices; more than six months has elapsed since such acts took place.

5. The Examiner erred in refusing to consider evidence offered by Respondent and indicated that no evidence would be accepted with respect to Respondent's contention that any concerted activity of the charging parties had an unlawful purpose and was carried on by unlawful means.

6. The Examiner erred in refusing to permit the respondent to question witnesses with respect to the planning of the desertion of the circuits and the instructions given to persons who were to participate therein and the action taken by the striking employees during the period following the establishment of the picket line. The Examiner also erred in refusing to consider evidence with respect to the choice of the strikers to cause a precipitous work stoppage while on watch rather than making a protest on their own time, to which the Respondent had indicated willingness to give consideration, or by a protest by one representative, to which procedure Respondent had agreed.

7. The Examiner erred in cutting off the Respondent in presenting evidence to show that the strikers were free to return to work, prior to their replacement by new permanent employees, had they given up their condition that Jones first be reemployed and to show that each of the individual strikers was free to return to work prior to his replacement by a new permanent employee had he given up his condition that Jones first be reemployed.

8. The Examiner erred in denying Respondent's

motion to exclude witnesses from the hearing room prior to their testifying.

Dated: San Francisco, California, December 7, 1949.

Respectfully submitted,

/s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHEGLER &
HARRISON,

Counsel for Respondent.

Received Dec. 13, 1949, NLRB.

[Title of Board and Cause.]

COUNSEL FOR THE GENERAL COUNSEL'S¹
EXCEPTIONS TO THE INTERMEDIATE
REPORT

The General Counsel of the National Labor Relations Board hereby excepts to the Intermediate Report of the Trial Examiner, dated October 28, 1949, in the above-entitled proceeding in the following particulars:

Page 3, Lines 10-13*

1. To that part of the findings of fact which states that Jones had had about 30 years' experience in the communications field, much of it as an

¹Hereinafter referred to as the General Counsel.

*Reference to Intermediate Report.

automatic printer operator and point to point operator, "although on machines different from those used by Respondent," whereas the record shows he had had experience on machines similar to those used by Respondent.

Page 3, Lines 25-28*

2. To the finding that Jones was a member, along with other employees, of the Grievance Committee which conducted negotiations for a new contract, whereas the record discloses that Jones was a member of the Negotiating Committee which sought to negotiate a new contract with Respondent and was also on the Grievance Committee which was separate and distinct from the Negotiating Committee.

Page 3, Lines 28-29*

3. To the finding, and the implication thereof, that Jones was one of 8 shop stewards among the approximately 20 Union members in Respondent's operating room, when the record shows that Jones played a greater part in meeting and dealing with management than other Union members.

Page 3, Lines 37-38*

4. To the finding that the Manila circuit is financially Respondent's most important one when the record contains no evidence to that effect or any evidence upon which to base such an inference.

*Reference to Intermediate Report.

Page 3, Lines 40-42*

5. To the finding that the speedy delivery of messages on the Manila circuit is of prime importance, when there is no such evidence.

Page 3, Lines 46-49*

6. To the failure, at this point, to find that Bruce was not only not a member of the A.C.A. but was an active member of the I.B.E.W., a rival union which was seeking to represent the Respondent's employees.

Page 4, Lines 1-4*

7. To the finding that McDowell, Jones' immediate supervisor, reported to Bash that unless Jones improved his speed he would have to have an additional operator assigned to the Manila circuit, when there is no such evidence in the record.

Page 4, Lines 1-4*

8. To the failure of the Trial Examiner to find that McDowell had aided and actively assisted the I.B.E.W., a rival union, in the campaign preceding an election held several months prior to the discharge of Jones.

Page 4, Lines 14-15*

9. To the finding that Bash left Jones and prepared a report of Jones' refusal to practice punching to McPherson, Assistant Manager, whereas the record discloses that Bash made up the report the

*Reference to Intermediate Report.

next day and that McPherson was Manager of the Respondent's San Francisco office.

Page 4, Lines 19-21*

10. To the finding that Jones' place on the Manila circuit was taken by Malcolm Parks, Chairman of the Shop Committee for the A.C.A., when the record contains no such evidence or any evidence from which such an inference could logically be drawn.

Page 4, Lines 26-30*

11. To the finding that Jones was called to McPherson's office where he was asked if it was true that he refused to practice punching as ordered by Bash whereas the record shows that McPherson had already determined to discharge Jones and he was called in to be told of that fact.

Page 4, Lines 34-35*

12. To the failure to find that McPherson had met with General Boatwright, senior vice-president of the Company, and Anderson, vice-president of Robert Dollar Company, the parent corporation, and that they had reached a decision to discharge Jones prior to McPherson calling in Jones.

Page 4, Lines 34-35*

13. To the failure of the Trial Examiner to find, at this point, that the Respondent deviated from its usual investigatory procedure when a supervisor

*Reference to Intermediate Report.

lodges a complaint against an employee and concluded to discharge Jones without having first obtained his version.

Page 4, Lines 45-46*

14. To the statement that the seriousness of Jones' refusal to practice, in and of itself, as affecting discipline can hardly be denied since a matter of discipline was not involved.

Page 5, Lines 1-3*

15. To the finding that there is no substantial evidence that Bash's direction to Jones was prompted by anything else than legitimate business considerations, since the record is replete with evidence to the contrary.

Page 5, Lines 1-3*

16. To the failure of the Trial Examiner to find, at this point, that Jones kept abreast of the flow of messages on the Manila circuit and was never behind and that delays in transmittal of messages, if any, were due to atmospheric conditions.

Page 5, Lines 3-6*

17. To the finding that Jones' own reason for refusing to obey Bash's instructions was that he was punching at as great a speed as was consistent with accuracy and that he was insulted by Bash's order, since the record also shows that Jones, in the light of his age and experience, was punching at his maximum speed.

*Reference to Intermediate Report.

Page 5, Lines 6-10*

18. To that part of the finding that Bash's reasonableness in so instructing Jones is not in issue, since one of the prime issues in this proceeding is whether Jones was discharged for union activity or for cause and the reasonableness of Bash's order under all the circumstances is an important factor to be considered in deciding this issue.

Page 5, Lines 6-10*

19. To the failure of the Trial Examiner to find that Bash had been a member of the I.B.E.W., a rival union.

Page 5, Lines 10-15*

20. To the statement that Jones had been on the noon to 8 p.m. watch where his time was devoted mainly to the important Manila circuit for only a few days, and it might reasonably be expected that his punching would not be as satisfactory as it had been on his previous watch where he had worked principally on the less important Shanghai circuit, since the record abundantly establishes that he had worked on the Manila circuit for many months on his prior watch.

Page 5, Lines 10-15*

21. To the failure of the Trial Examiner to find that when messages did not go out properly and promptly, McPherson usually took the matter up with McDowell and that McDowell has not

*Reference to Intermediate Report.

received any complaints from McPherson during the week in which Jones was discharged.

Page 5, Lines 17-20*

22. To the statement that if Bash meant to discriminate against Jones because of his Union activity it is hardly likely he would have transferred Parks to Jones' place on the Manila circuit, since there is no evidence to establish that Parks was transferred to Jones' place on the Manila circuit.

Page 5, Lines 19-20*

23. To the finding that Parks was more active on behalf of the Union than Jones, when the evidence establishes that Jones was more active and was so regarded by Parks and others.

Page 5, Lines 30-35*

24. To the gratuitous statement that it would seem as much beside the point to speculate to what extent Bash's and the Respondent's hostility toward the Union may have motivated Bash, as it would be to speculate whether Jones or the Union may have intended to disrupt and impede Respondent's operations so as to render it more amenable to recognize the Union, since the record is completely devoid of any basis for such finding or statement.

*Reference to Intermediate Report.

Page 5, Lines 30-35*

25. To the failure of the Trial Examiner at this point to find that the discharge of Jones was the result of a plan and scheme of the Respondent to rid itself of all A.C.A. adherents.

Page 5, Lines 37-38*

26. To the finding that Jones flatly and admittedly disobeyed an order which on its face was legitimate and reasonable, when the evidence overwhelmingly establishes the unreasonableness of the order and that it was a cloak in which to mask the Respondent's motive for Jones' discharge.

Page 5, Lines 38-42*

27. To the finding that neither the order nor Respondent's discharge of Jones is shown by substantial evidence to have been motivated by Respondent's dislike of the Union or Jones' activities on its behalf, when there is more than substantial evidence to the contrary.

Page 5, Lines 51-52*

28. To the finding that Parks demanded of Bash that Jones be reinstated, when the clear evidence shows that Parks protested the discharge and requested an opportunity to discuss it and was not given such opportunity.

Page 5, Lines 56-57*

29. To the finding that Bash was told by the

*Reference to Intermediate Report.

group of employees on the watch that he "couldn't get away with" discharging Jones, when the record fails to disclose any such statement by the group.

Page 6, Lines 1-5*

30. To the finding that Bash after 5 p.m. again asked each of the operators to return to his circuit and that each replied he would do so only when Jones was reinstated, when the record discloses that prior to that hour they had been "clocked out" by him and that at about 5 p.m. they again requested an opportunity to discuss the matter with a representative of management and stated their desire to return to their circuits and were there-upon discharged.

Page 6, Lines 5-6*

31. The Trial Examiner failed, at this point, to find that Malcolm Parks was discharged by Respondent while he was on his day off and that such discharge was solely for the reason that he sought to discuss Jones' discharge.

Page 6, Lines 9-11*

32. To the finding that McPherson inquired of the group as to whether they were going to return to work and their reply that they would not work until Jones was reinstated, when the evidence shows that they did not condition their return on Jones' reinstatement but stated they desired to return to their jobs although fired by Bash and requested

*Reference to Intermediate Report.

information as to Jones' discharge and the reasons therefore and were not given any.

Page 6, Lines 14-16*

33. To the finding that the group demanded of McPherson the reinstatement of Jones as a condition of their resuming work and McPherson then told them they were discharged, when the evidence establishes that they had previously been discharged by Bash and that the first question they asked McPherson upon seeing him was whether they were discharged and he confirmed that fact.

Page 6, Lines 28-29*

34. To the finding that the midnight to 8 a.m. watch made it clear that none of them would return to work until and unless Jones was reinstated, when the evidence does not support such a finding but establishes that they protested Jones' discharge and requested a meeting with someone in authority who would and could discuss the matter.

Page 6, Lines 33-34*

35. To the finding that somewhat later Bash told the midnight watch that they were discharged and ordered them to leave the premises when the evidence shows that he removed their time cards, told them they were fired and called the building guard to escort them out.

*Reference to Intermediate Report.

Page 6, Lines 52-54*

36. To the statement that it is unnecessary to discuss the evidence as to whether a doctor's certificate was generally required of employees when absent because of sickness, when the evidence shows that the Company, in the absence of a physician's certificate, only withheld pay and did not discharge an employee for failure to supply such certificate as was done in this instance.

Page 6, Lines 54-56*

37. To the finding that Guerrero was an evasive and unconvincing witness and that the Trial Examiner does not regard his testimony that he was sick as credible, since the record abundantly supports his claim of illness and the matter of whether he was ill or not is wholly immaterial to the issues in this proceeding and should not have been considered by the Trial Examiner in deciding the question of credibility or the issues.

Page 7, Lines 15-18*

38. To the finding that Bash's testimony with respect to his telephone call to Wheeler is in accord with the facts and Wheeler should have understood his job was open to him if he wanted it, but that instead he preferred to support his fellow employees, since the record supports Wheeler in his understanding that Bash had discharged him.

*Reference to Intermediate Report.

Page 7, Lines 18-20*

39. To the statement that there would seem to have been no point in Bash's telephoning Wheeler unless it was for the purpose of asking him to come to work, since the record shows that Wheeler had not indicated any prior intention of not reporting for work but had every intention to report.

Page 7, Lines 22-25*

40. To the finding that there seems no reason to doubt Bash's testimony that he meant Wheeler would have more difficulty obtaining another job and is consistent with Bash's urging him to keep the one he had, since the evidence is that Bash had discharged Wheeler.

Page 7, Lines 60-63*

41. To the implication in footnote 7 that there was a duty on the part of Guerrero and Wheeler to respond to McPherson's telegrams requesting them to see him for the purpose of reviewing their discharges, when they had no such duty and were properly exercising their rights under Section 7 of the Act.

Page 7, Lines 48-50*

42. To the finding and conclusion that the charging parties refused to perform their work until Jones was reinstated, since the record clearly establishes that they refused to return to their jobs until

*Reference to Intermediate Report.

management met with them for the purpose of discussing Jones' discharge.

Page 7, Lines 50-54*

43. To the finding and conclusion that Jones' discharge was not occasioned by his union activities but was for legitimate business reasons and that the strike of the other employees in protest was not protected concerted activity, since this finding and conclusion is against the great weight of the evidence.

Page 7, Lines 54-55*

44. To the finding and conclusion that any or all of the charging parties could have had their jobs back at any time before they were filled by new employees, since the evidence shows they had all been discharged for engaging in protected concerted activity and could only have their jobs back if they abandoned their rights under the Act.

Page 7, Lines 55-59*

45. To the finding and conclusion that there has been no request for reinstatement when the record contains evidence that such a request was made and rejected.

Page 8, Lines 1-3*

46. To the finding and conclusion that under familiar decisions of the Board, Respondent is not obligated to reinstate the strikers when the Board decisions hold contra.

*Reference to Intermediate Report.

Page 9, Lines 5-10*

47. To the entire finding and conclusion in this paragraph, since Bash's statement to Pottle contained an implied threat of reprisal in violation of Section 8(a)(1) and was not protected by Section 8(c).

Page 9, Lines 13-22*

48. To the entire finding and conclusion in this paragraph, since Bash's agreement with Pottle's statement as to the Respondent's intention to discriminate against members of the Union palpably established that Jones was discharged for Union activity even though Bash's acquiescence in her statement was not per se violative of the Act.

Page 9, Lines 13-22*

49. To the failure of the Trial Examiner to find or to discuss and credit the uncontroverted testimony of Lorraine Conger that Bash had telephoned her and informed her of Jones' discharge and had stated that "Jones and Risley, those two stinkers, had been engaged in too much union activity," and that "this A.C.A. outfit is nothing more than a bunch of Communists."

Page 9, Lines 13-22*

50. To the failure of the Trial Examiner to find or to discuss and credit the uncontroverted testimony of Virginia Kelso that Bash had telephoned her on the evening of January 22 and told

*Reference to Intermediate Report.

her that the Company wants the Union out of there and that they were starting "with guys like Chuck Jones and Bruce Risley and they are going on down the line."

Page 9, Lines 33-34*

51. To the third conclusion of law.

Page 9, Lines 38-40*

52. To the recommendation that the complaint be dismissed, since such recommendation is based on findings and conclusions which are contrary to the great weight of the evidence.

Respectfully submitted,

/s/ NATHAN R. BERKE,

Counsel for the General
Counsel.

Dated at San Francisco, California, this 10th day of December, 1949.

Acknowledged: Dec. 12, 1949.

*Reference to Intermediate Report.

United States of America

Before the National Labor Relations Board

Case No. 20-CA-193

In the Matter of

GLOBE WIRELESS, LTD.,

and

LORRAINE E. CONGER, LILLIE I. FRIEND,
PAUL GUERRERO, JOHN GYURCSIK,
ALBERT E. HINDE, CHARLES A. JONES,
VIRGINIA KELSO, VIOLET A. LEACH,
JESSE E. McLIN, HOMER E. MULLIGAN,
RUDOLPH W. NIEMI, MALCOM G.
PARKS, LOUIS PENA, SYLVIA POTTLE,
BRUCE E. RISLEY, GEORGE J. ROSEN-
GREN, DAVID E. SHEAFFER, PAULINE
SMITH, LESLIE T. WHEELER, VIOLA
H. WILLIAMS,

Individuals.

DECISION AND ORDER

On October 28, 1949, Trial Examiner Horace A. Ruckel issued his Intermediate Report in this case, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter all

parties filed exceptions to the Intermediate Report and supporting briefs. The charging parties requested oral argument. This request is hereby denied because the record, exceptions and briefs, in our opinion, adequately present the issues and positions of the parties.¹

The Board² has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby

¹After the issuance of the Intermediate Report the charging parties filed a motion to augment record, in which the General Counsel joined, for the purpose of introducing evidence that a request for reinstatement had been made on behalf of the charging parties. In its response to this motion the Respondent agreed to the inclusion of this evidence provided it is accepted solely to establish that a conditional request for reinstatement was made, but requested that, in any event, it be permitted to introduce evidence with respect to the replacement of the charging parties prior to their request for reinstatement. As we hereinafter find that the evidence offered by the charging parties establishes only a conditional request for reinstatement, there is no outstanding objection to the motion to augment the record. It is hereby granted and the evidence hereby made a part of the record in this case. In view of our findings hereinafter set forth, evidence as to the replacement of the charging parties prior to their request for reinstatement is irrelevant and the Respondent's request to introduce such evidence is hereby denied.

²Pursuant to the provisions of Section 3 (b) of the Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

affirmed.³ The Board has considered the Intermediate Report, the exceptions,⁴ and briefs, and the

³The Trial Examiner properly granted the General Counsel's motion to strike the following defenses: (a) that the charges are not filed by the charging individuals but were filed on their behalf by the American Communications Association, herein ACA, a noncomplying union; (b) that the ACA restrained and coerced nonmembers and had attempted to cause the Respondent to discriminate in favor of the ACA; (c) that no relief could be granted to effectuate the policies of the Act. The provisions of Section 9 (f), (g), and (h) impose no limitations of the filing of charges by individuals, and the fact that the noncomplying union may have assisted members in filing charges is immaterial. *Augusta Chemical Company*, 83 NLRB No. 7; see *Olin Industries, Inc.*, 86 NLRB No. 36. Neither noncompliance nor misconduct on the part of the ACA constitutes any defense to the charges here. See *Andrews Company*, 87 NLRB No. 62, and *Irwin-Lyons Lumber Company*, 87 NLRB No. 9. Evidence relating to these defenses was therefore properly excluded.

The Trial Examiner refused to exclude the complainants as witnesses in granting the Respondent's motion to sequester witnesses. Complainants are generally not excluded. *Biggs Antique Company, Inc.*, 80 NLRB 345, 348. The related motion to sever the charges was properly denied. See *N.L.R.B. v. Kinner Motors*, 152 F. 2d 816 (C.A. 9).

⁴We find no prejudicial error in the Regional Director's dismissal of the Respondent's application for taking depositions before a notary public of all of the 20 individuals who filed charges, and for subpoenas to require their attendance. The dismissal was without prejudice to make the subpoenas returnable at the hearing. See *Paul Uhlich & Co., Inc.*, 26 NLRB 679, 681.

entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent that they are consistent herewith.

1. The complaint alleged that the Respondent violated Section 8 (a) (1) by threatening its employees with discharge or demotion as a penalty for activity on behalf of the ACA and by other similar acts and conduct. The Respondent contends that these allegations are not properly before us because the charges alleged violations of Section 8 (a) (1) and (3) by certain discharges, and did not contain any averment alleging the independent violations of Section 8 (a) (1) subsequently included in the complaint. We do not accept the Respondent's contention that a complaint issued under the amended Act is limited in scope by the averments contained in the charge filed to initiate the proceeding. On the contrary, we have held that "a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing of such charge."⁵ The complaint herein lawfully enlarged upon the charge.⁶

The Trial Examiner, however, dismissed the allegation of 8 (a) (1) violations on the ground that the statements made were privileged under Section 8 (c). We do not agree.

⁵Cathey Lumber Company, 86 NLRB No. 30.

⁶Biggs Antique Company, Inc., 80 NLRB 345, 348.

The Trial Examiner found that Bash told Pottle the Respondent “had ‘to get rid of the Communists,’ that the ACA would never come back into the plant, and that if Pottle was wise she would get out of the ACA ‘while the getting was good.’ ” We agree with the Trial Examiner’s implicit holding that Bash was privileged to label the ACA leaders and members as “Communists.”⁷ But we cannot agree that Bash’s further statements were not violative of the Act. In context, his statement that the ACA would never come back clearly implied that the Respondent would resort to any measure necessary to rid itself of that union.⁸ His admonition to get out while the getting was good was an unequivocal warning that the Employer intended to discriminate against ACA members,⁹ combined with an assurance that if Pottle left the union her position would be safe.¹⁰ We also consider in this category the other statements of Bash, to Conger and Sheaffer and others, that “if you are going to tie yourselves to the tail of this Communist kite, you can sink with it.” That statement

⁷Morristown Knitting Mills, Inc., 86 NLRB No. 46; see El Paso-Ysleta Bus Line, Inc., 85 NLRB No. 193.

⁸See Crosby Chemicals, Inc., 85 NLRB No. 139; J. S. Abercombie Company, 83 NLRB No. 85.

⁹Dixie Mercerizing Company, 86 NLRB No. 37.

¹⁰The Red Rock Company, 84 NLRB No. 65.

was a warning that the Respondent intended to oust the ACA and discharge its adherents.¹¹

The record, as the Trial Examiner indicated, reflects various other statements of this nature by Bash. We find likewise violative (a) Bash's warning to Conger that the ACA couldn't do her any good, in view of his counselling her to "remember that it's pretty nice to keep eating, you know"; (b) Bash's statement to Kelso that the Respondent wanted the Union out of its offices and that it was starting with "guys like Chuck Jones and Bruce Risley and * * * going down the line." Such a statement, under the circumstances, was a clear warning to Kelso to disavow the union or—as he had stated to other employees—"sink with it."

We find that the Respondent violated Section 8 (a) (1) by these statements.

2. The Trial Examiner found that the discharge of Charles Jones was for insubordination and did not violate Section 8 (a) (3) of the Act. We agree.¹² Jones admitted having flatly refused to perform certain tasks assigned him during his working time. The fact that he was active on behalf of the ACA, a union which the Respondent sought

¹¹Keith Furnace Company, 73 NLRB 754; N.L.R.B. v. C. D. Beck & Company, 157 F. 2d 514, 515 (C.A. 6), cert. den, 330 U. S. 838.

¹²The Trial Examiner made several inadvertent misstatements in his account of the Jones' episode. These mistakes were immaterial to his decision, and are to ours; we therefore find no need to enumerate them.

to eliminate, did not give him immunity for refusing to comply with such directions by management.¹³

3. Unlike the Trial Examiner, we find that the Respondent violated Section 8 (a) (3) and 8 (a) (1) when, on January 21 and 22, it discharged 16 of the complainants because they struck in protest¹⁴ against Jones' discharge.

The Trial Examiner correctly found that as the strike was in protest against a lawful discharge it was an economic strike, and the Respondent was free to replace such strikers at any time prior to their unconditional request for reinstatement. However, it does not follow from this that the Respondent was free to discharge the strikers before they had been replaced. Under the circumstances of this

¹³See *N.L.R.B. v. Ross Gear & Tool Company*, 158 F. 2d 607, 612-614 (C.A. 7). The direction in the instant case was not on its face so arbitrary as to warrant the inference that it was given in order to be violated. Cf. *The Russell Manufacturing Company, Incorporated*, 82 NLRB No. 136.

¹⁴The Trial Examiner found that the strikers demanded Jones' reinstatement, although the charging individuals testified that they had requested an opportunity to discuss it. However, it is immaterial whether the employees were withholding their services in order to force Jones' reinstatement or to secure a discussion of what they regarded as a grievance. Under either view the strike was a protected concerted activity. See *Kallaher and Mee, Inc.*, 87 NLRB No. 61; *Agar Packing & Provision Corporation*, 81 NLRB 1262.

case,¹⁵ the discharges violated Section 8 (a) (3) and 8 (a) (1) of the Act,¹⁶ unless there is merit to the Respondent's contentions that the strike was for an unlawful purpose or otherwise unprotected.

The Respondent contends that the strike contravened the Federal Communications Act of 1934 and was therefore illegal under the doctrine of the Southern Steamship Co. case.¹⁷ This contention is based on the assertion that any work stoppage

¹⁵The Trial Examiner found that Bash, in accordance with McPherson's instructions, gave the two groups the option of returning to work or striking and told them that they were discharged when they chose to strike. He also found that McPherson confirmed the first group discharge and then renewed the option. McPherson testified: "I told them that they should return to their jobs, if they didn't I had no alternative but to discharge them." He admitted discharging them when they refused to return to work. All of the charging individuals received "final pay checks" covering their salaries to the dates on which they were told that they were discharged. As the Respondent did not attempt to settle the strike or solicit the return of the strikers, we find no basis for concluding, as did the Trial Examiner, that "any or all of them could have had their jobs back at any time before they were filled by new employees." The record clearly establishes that the strikers were discharged before they had been replaced; therefore, evidence relating to their subsequent replacement is not material.

¹⁶Kallaher and Mee, Inc., 87 NLRB No. 61, and cases cited therein; cf. Kansas Milling Company, 86 NLRB No. 136, and cases cited therein.

¹⁷Southern Steamship Company v. Labor Board, 316 U. S. 31; The American News Company, Inc., 55 NLRB 1302.

would, in violation of Section 501 of that Act,¹⁸ cause the Respondent to breach its statutory duty to furnish service. We find no merit in this contention. The Act prohibits the licensee from voluntarily abandoning service without the approval of the Commission;¹⁹ it does not penalize the licensee whose failure to continue service is attributable to others, as in the case of a strike. The Act does require a licensee to serve without discrimination, i.e., "upon reasonable request";²⁰ but that duty is not breached if a strike prevents the licensee from serving anyone.

The Respondent also argues that the strikers are not protected because they violated nondiscriminatory company rules and their contract of employment by stopping work. The Respondent relies on a notice, posted on October 21, 1948,²¹ stating that

¹⁸47 U.S.C. "Sec. 501. Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who wilfully and knowingly permits or fails to do any act, matter, or thing in this Act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished * * *"

¹⁹47 U.S.C. Sec. 214.

²⁰47 U.S.C. Sec. 201.

²¹The Globe-ACA contract, which expired on August 15, 1948, contained a no-strike clause. Thereafter the Respondent refused to recognize the ACA because it had not complied with Section 9 (f). (g),

“the Company reserves the right to discharge, suspend, or otherwise discipline any employee it has reason to believe is failing to perform his work properly.” The Respondent enlarges the clear intentment of this provision, which we have already recognized in finding that Jones was discharged for cause, to prohibit its employees from protesting Jones’ discharge on the premises and during their working hours. We agree that the employees cannot “continue to work and remain at their positions, and at the same time select what part of their allotted tasks they cared to perform of their own volition.”²² However, these employees engaged in a complete work stoppage and were discharged because they chose to strike.

The Respondent further contends that the strike violated Section 8 (b) (2) in that its purpose was to compel the Respondent to discriminate in favor of Jones because of his activity in and on behalf of the ACA. The record is replete with evidence that the strikers believed that Jones had been discriminatorily discharged, because of his ACA membership and activities, and feared similar reprisals against themselves. Under these circumstances,

and (h) of the Act. The notice of October 21 repeated the Respondent’s position and contained the further statement that it rejected the terms of the expired contract. The terms of that contract are therefore not applicable here. See *Columbia Pictures Corporation, et al.*, 64 NLRB 490, 506.

²²N.L.R.B. v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496 (C.A. 8).

there is no basis for the assertion that the strikers were seeking to compel the Respondent to give preference of employment to the active ACA members and adherents or to permit them to engage in insubordination merely because of their union membership.²³ Moreover, the Board has generally recognized that a strike to protest a nondiscriminatory discharge is protected concerted activity.²⁴

The Respondent also argues that the strikers were not protected because they engaged in a sit-down strike. The employees stood around Bash's desk for about an hour while they discussed Jones' discharge. They left immediately after they were discharged. They did not claim to hold the premises in defiance of the owner's right of possession. We do not regard their action as in the nature of a sit-down strike.²⁵

We therefore find no merit in the Respondent's several contentions that the strike was unprotected and conclude that the discharge of the strikers violated Section 8 (a) (3) and 8 (a) (1) of the Act.

4. We find that the Respondent also violated Section 8 (a) (3) and 8 (a) (1), when, on January

²³National Maritime Union, 78 NLRB 971, on which the Respondent relies, is therefore inapposite.

²⁴Kallaher and Mee, Inc., *supra*, and cases cited therein.

²⁵N.L.R.B. v. American Manufacturing Company, 106 F. 2d 61, 67-68 (C.A. 2), modified and affirmed 309 U. S. 629; cf. N.L.R.B. v. Condencer Corporation of America, 128 F. 2d 67, 77 (C.A. 3).

24, it discharged employees Guerrero, Wheeler, and Friend, because they aligned themselves with the strikers.

The Trial Examiner found that Bash fired Guerrero because he was justified in believing that Guerrero was feigning illness and that he was aligning himself with his fellow ACA members in going on strike. The Trial Examiner found that Bash discharged both Wheeler and Friend when it became clear to him that they chose to join the strike rather than work. The record supports these findings.

When Bash learned that Guerrero had been reported out because of illness, he telephoned Guerrero and told him to report for work anyway, because he was not going to stand for any union tricks.²⁶ Bash testified that he told Guerrero to get a doctor's certificate. Guerrero reported for work at his usual hour on January 24; Bash asked him if he had a doctor's certificate. Guerrero replied that he did not, and had never before had to have one for 1 day's absence due to illness.²⁷ Bash immediately discharged him. Bash testified significantly that he then told Guerrero, "I know you are going to make me reinstate Chuck Jones, now get down

²⁶Barlow was the secretary of the ACA. Bash admitted telling Guerrero that he "wouldn't stand for any Barlow tricks."

²⁷According to Bash, the general practice was to excuse absence caused by illness without medical certificates, but to pay sick leave only to those who presented certificates.

there on the bricks with the rest of them and make me do it." We think it clear that Bash fired Guerrero because he thought Guerrero had joined the strike. The fact that he may have been mistaken does not render his discharge of Guerrero the less an unfair labor practice.²⁸

Wheeler and Friend were with Guerrero when he was fired. Bash then told Wheeler he was discharged because he had not shown up for work the night before.²⁹ Before Wheeler could explain, Bash told him to go outside with Guerrero and "try to make him reinstate Chuck Jones, Bruce Risley, and company." Guerrero and Wheeler left. Bash then turned to Friend and told her to get to work. When she began to talk about the various discharges, Bash brusquely told her to "trot along then."³⁰ She then joined Guerrero and Wheeler and all three went down to the picket line. The Respondent contends that it was entitled to put to the employees the choice of working or striking and that it did so.

²⁸N.L.R.B. v. Link-Belt Company, 311 U. S. 854, 859-860.

²⁹As we find that Bash unequivocally discharged Wheeler on January 24, we need not resolve the conflicting testimony concerning the import of Bash's telephone call to Wheeler on January 23. It is apparent that Bash thought that Wheeler, as well as Guerrero, had absented himself from sympathy with the strikers.

³⁰As Friend received terminal notice along with the rest of the dischargees, we regard this statement of Bash tantamount to a discharge.

We agree. However, the same reasons which make the group discharges unlawful apply and make these discharges violative of Section 8 (a) (3) and 8 (a) (1).

The effect of the unfair labor practices upon commerce.

The activities of the Respondent, set forth above, occurring in connection with the operations of the Respondent, described in Section I of the Intermediate Report, have a close, intimate, and substantial relation to commerce and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

The discharge of employees because they engaged in concerted activity protected by Section 7 of the Act violates Section 8 (a) (1) of the Act. Because such discharge amounts to a discrimination in hire and tenure of employment, thereby discouraging membership in a labor organization,³¹ it also violates Section 8 (a) (3). Moreover, whether the discharges be regarded as a violation of Section 8 (a) (1) or of Section 8 (a) (3), we find that it is necessary to order reinstatement with back pay, as

³¹It is immaterial whether or not the rights were asserted through the organization to which the group members in fact belonged. *Augusta Chemical Company*, *supra*; *Gullett Gin Company, Inc.*, 83 NLRB No. 1, enforced 25 LRRM 2340 (C.A. 5); *Olin Industries, Inc.*, *supra*.

hereinafter provided, in order to effectuate the policies of the Act.³²

We are convinced on the record as a whole that the unfair labor practices committed by the Respondent are potentially related to other unfair labor practices prescribed and that danger of their commission in the future is to be anticipated from the Respondent's conduct in the past. In order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, we shall, accordingly, order the Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act.³³

It is our practice to award employees who are discriminatorily discharged while on strike back pay from the date when they unconditionally requested reinstatement rather than from the date of their discriminatory discharges, on the theory that the loss of wages cannot conclusively be attributed to the discharge until the employees have indicated their willingness to abandon the economic strike.³⁴ From the evidence which is now before us³⁵ it appears that on March 2, 1949, the dischargees requested reinstatement. That request,

³²Sandy Hill Iron & Brass Works, 55 NLRB 1; and see footnote 3 *supra*.

³³May Department Stores v. N.L.R.B., 326 U. S. 376.

³⁴Massey Gin and Machine Works, 78 NLRB 189; Kallaher and Mee, Inc., *supra*.

³⁵See footnote 1, *supra*.

however, was for the reinstatement of all the charging parties, including Charles Jones. The Respondent refused to make a group reinstatement and regarded the request as conditional upon the reinstatement of Charles Jones. We conclude that no unconditional request for reinstatement had been made, indicating the charging parties' willingness to abandon the strike.³⁶ As the record does not enable us to determine whether the strike has been otherwise abandoned, we shall order back pay only from the date of such abandonment to the date on which the Respondent offers reinstatement to the employees named in Appendix A.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the Board hereby orders that the Respondent Globe Wireless, Ltd., San Francisco, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in labor organizations of its employees by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise

³⁶See *Wilson & Co., Inc.*, 77 NLRB 959, 962, 981, footnote 37.

of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees named in Appendix A, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions,³⁷ and make them whole³⁸ for any loss of wages suffered as a result of the discrimination against them, in the matter described in the section above entitled *The Remedy*;

(b) Post immediately at its office and place of business in San Francisco, California, copies of

³⁷In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico*, Branch, 65 NLRB 827.

³⁸See *Crossett Lumber Company*, 8 NLRB 440; *E. R. Haffelfinger Company, Inc.*, NLRB 760.

the notice attached hereto and marked Appendix A.³⁹ Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twentieth Region in writing, within twenty (20) days from the date of receipt of this Order what steps Respondent has taken to comply herewith.

It Is Further Ordered that the complaint, insofar as it alleges other violations of the Act, be, and it hereby is, dismissed.

Signed at Washington, D. C., this 20th day of March, 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

ABE MURDOCK,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

³⁹In the event that this Order is enforced by a decree of a Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

Appendix A

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the amended Act.

We Will Offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a

result of the discrimination against them, as set forth in the Decision and Order:

Albert E. Hinde	George J. Rosengren
Virginia Kelso	David E. Sheaffër
Violet A. Leach	Pauline Smith
Jesse E. McLin	Leslie T. Wheeler
Homer E. Mulligan	Lorraine E. Conger
Rudolph W. Niemi	Lillie I. Friend
Malcolm G. Parks	Paul Guerrero
Louis Pena	John Gyuresik
Sylvia Pottle	Viola H. Williams
Bruce E. Risley	

All our employees are free to become or remain members of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

GLOBE WIRELESS, LTD.,
(Employer)

By
(Representative) (Title)

Dated

This notice must remain posted for 60 days from

the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-193

In the Matter of

GLOBE WIRELESS, LTD.,

and

LORRAINE E. CONGER, PAUL GUERRERO,
LILLIE I. FRIEND, JOHN GYURCSIK,
ALBERT E. HINDE, CHARLES A. JONES,
VIRGINIA KELSO, VIOLET A. LEACH,
JESSE E. McLIN, HOMER E. MULLIGAN,
RUDOLPH W. NIEMI, MALCOLM G.
PARKS, LOUIS PENA, SYLVIA POTTLE,
BRUCE B. RISLEY, GEORGE J. ROSEN-
GREN, DAVID E. SHEAFFER, PAULINE
SMITH, LESLIE T. WHEELER, VIOLA
H. WILLIAMS

Tuesday, July 26, 1949

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock a.m.

Before: Horace A. Ruckel, Esq.,

Trial Examiner.

Appearances:

NATHAN R. BERKE,

821 Market Street,

San Francisco, California,

General Counsel, National Labor
Relations Board.

BROBECK, PHLEGER & HARRISON, by
RICHARD ERNST,

111 Sutter Street,

San Francisco, California,

Appearing on Behalf of Globe Wire-
less, Ltd., the Respondent.

PROCEEDINGS

* * *

We therefore move that the Trial Examiner continue this hearing and that the issues of subpoenas, in accordance with this application which I hand the Trial Examiner, will require the attendance of each of the persons who are named in the title of the case. [11*]

* * *

Now, the Act says in Section 11 in very clear, simple language, that subpoenas shall be issued as follows:

“The Board or any member thereof shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

investigation requested in such application.”

The rules of the Board provide that the Regional Director shall act for the Board prior to the commencement of hearing, and the Trial Examiner, once the hearing has been commenced.

We filed timely a proper application with the Regional Director, but he failed to perform his duty in accordance with the requirements of the law. We have called this to your attention and feel that you are the only person who can cure it and we ask you to cure it by issuing the depositions called for and [12] continuing the hearing to permit them to be complied with and we do have the opportunity for discovery, as permitted by the Federal Rules of Procedure and the State Rules in virtually every State in the United States. [13]

* * *

Trial Examiner Ruckel: I know of no precedent for the granting of counsel's motion. The Trial Examiner does issue subpoenas but he issues them during the course of the hearing. [14]

* * *

As far as opportunity to confer with the witnesses is concerned, I know of no such precedent. The Respondent is entitled, as any defendant is entitled, to know what he is charged with. He is not entitled to know the exact nature of the evidence which the Government or the Complainant in a civil cause brings.

* * *

Further reading of the Complaint convinces me or shows plainly that there are no declarations or acts of supervisory employees which are relied upon as constituting a breach of the Act, with the exception that, of course, some individual, supposed to be a supervisor or officer, did discharge certain individuals. The Respondent's Answer makes it clear that they were discharged. [15]

Now, it is fully within the Respondent's knowledge who that individual was and the reasons why in their opinion they were discharged, the reason why in its opinion, that is, the Corporation's, they were discharged, and the Answer fully rationalizes the discharges.

* * *

Mr. Ernst: And is the application for the subpoenas denied? I don't want to burden you or the record, but I think that the amendments of 1947 have the effect of giving parties such as Globe Wireless the same right as the Board to require the production and opportunity to consider evidence and gain knowledge as to what evidence was to be produced. The Board claims apparently the right to compel the production of evidence prior to the commencement of the formal hearing. If the Board has that right, I submit, under this statute we have exactly the same right and that is given by the statute and we [16] being deprived of the right given us by the statute, and I see no way of preventing a mistrial of the case and either requiring a new trial, which doesn't make much

sense, or depriving the Board of any jurisdiction to decide in favor of the individual complainants, unless we prevent a mistrial at this stage in accordance with the motion I have made today.

* * *

Trial Examiner Ruckel: Well, on that representation I shall deny the application with the understanding that if it should appear that someone of these persons is not present and his testimony is desired by the Respondent, as the Respondent's own witness, that I shall entertain a motion or an application for subpoena at that time. [17]

* * *

Mr. Ernst: I have objection to 4.

Trial Examiner Ruckel: What is 4?

Mr. Ernst: It is the Complaint and Notice of Hearing, on the ground that there has been no showing and we contend that there can be no showing that any Complaint has lawfully [21] issued.

* * *

Trial Examiner Ruckel: The objection is overruled, and the Exhibits, including No. 4, may be received.

(The documents heretofore marked General Counsel's Exhibits Nos. 1(a) to (t), inclusive; 2(a) to (y), inclusive; 3(a) to (t), inclusive; 4(a), (b), (c) and (d), 5(a), (b), (c) and (d), 6, 7, and 8, for identification, were received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 5(a)

Case No. 20-CA-193

[Title of Board and Cause.]

APPLICATION FOR THE TAKING
OF DEPOSITION

Globe Wireless, Ltd., a party to the above-entitled proceeding, proposes that depositions shall be taken. It is proposed that such depositions be taken before Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, in the offices of Messrs. Brobeck, Phleger & Harrison, attorneys for Globe Wireless, Ltd., at Room 1100, 111 Sutter Street, San Francisco, California, beginning at 9:30 a.m., July 21, 1949, and that each of the following witnesses there testify by deposition upon oral examination at the time set forth after his name:

Albert E. Hinde,	9:30 a.m., July 21
2841 Sacramento Street,	
San Francisco, California.	

Charles Jones,	10:30 a.m., July 21
204 Park Street,	
Redwood City, California.	

Rudolph W. Niemi,	2:00 p.m., July 21
147 Arch Street,	
San Francisco, California.	

Malcolm G. Parks,	3:00 p.m., July 21
1840 Sunnydale Avenue,	
San Francisco, California.	

Bruce B. Risley,
House 598,
Marin City, California.

4:00 p.m., July 21

Globe Wireless, Ltd., sets forth the following reasons for the taking of these depositions:

1. The witnesses are all adverse parties to Globe Wireless, Ltd. in the above-entitled proceeding and the answer to the complaint in such proceeding has been served and filed.

2. Globe Wireless, Ltd. desires to take the deposition of these adverse parties for the purpose of discovery and for the use as evidence in the proceeding before the Board in accordance with the practice under Rule 26 of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

3. Employees of the Board under the general supervision of the General Counsel of the Board and the Regional Director for the Twentieth Region have taken statements from supervisory employees of the company having the principal information with respect to the matters at issue in the proceeding and, we are informed and believe, have taken statements from some or all of the other parties. Such statements are, under the usual practice of the attorneys on the staff of the General Counsel of the Board, made use of by such attorneys in preparation for and in the course of the trial of the proceeding under Section 10.

4. The depositions will furthermore give counsel for Globe Wireless, Ltd., with respect to the witnesses whose depositions are asked, equal treatment to that accorded to attorneys for the General Counsel of the Board in view of the availability to them of statements taken from supervisory employees of Globe Wireless, Ltd. and from other persons who might have testimony relevant to the issues of the dispute.

5. A party to a proceeding before a District Court of the United States or a state court in the State of California would, as a matter of right, be entitled to take the depositions called for in this application.

6. Provisions of Section 11 authorize the taking of these depositions and provide for the issuance of subpoenas in connection therewith (See Legislative History of the Labor Management Relations Act, 1947, pages 16, 201, 334 and 562).

7. The depositions should contribute to a more expeditious and orderly trial of the matter before the Trial Examiner, just as does the comparable practice so contribute to expeditious and orderly trial of proceedings before the state and federal courts.

8. The application for subpoenas directed to the persons named herein to testify by deposition, which is filed this day with the Board's Office for the Twentieth Region, states, with full particularity, the nature of the testimony sought and shows why it relates

to the matters before the Board in the above-entitled proceeding.

Dated: July 13, 1949.

Respectfully submitted,

GLOBE WIRELESS, LTD.,

By /s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHLEGER &
HARRISON,

Its Attorneys.

Service admitted.

Received July 26, 1949.

GENERAL COUNSEL'S EXHIBIT No. 5(b)

Case No. 20-CA-193

[Title of Board and Cause.]

APPLICATION FOR THE TAKING
OF DEPOSITION

Globe Wireless, Ltd., a party to the above-entitled proceeding, proposes that depositions shall be taken. It is proposed that such depositions be taken before Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, in the offices of Messrs. Brobeck, Phleger & Harrison, attorneys for Globe Wireless, Ltd., at Room 1100, 111 Sutter Street, San Francisco, California, beginning at 9:00 a.m., July 22, 1949, and that each of the following

witnesses there testify by deposition upon oral examination at the time set forth after his name:

Lorraine E. Conger, 9:00 a.m., July 22, 1949
1941 Taraval Street,
San Francisco, California.

Lillie I. Friend, 10:00 a.m., July 22, 1949
1299 O'Farrell Street,
San Francisco, California.

Paul J. Guerrero, 11:00 a.m., July 22, 1949
1315 Grove Street,
San Francisco, California.

John Gyuresik, 1:30 p.m., July 22, 1949
359 Vallejo Street,
San Francisco, California.

Virginia Kelso, 2:30 p.m., July 22, 1949
529 Masonic Avenue,
San Francisco, California.

Violet A. Leach, 3:30 p.m., July 22, 1949
221 Clipper Street,
San Francisco, California.

Jesse E. McLin, 4:30 p.m. July 22, 1949
107 East Vista Avenue,
Daly City, California.

Homer E. Mulligan, 9:00 a.m., July 23, 1949
166 Gaven Street,
San Francisco, California.

Louis Pena, 10:00 a.m., July 23, 1949
227 Dore Street,
San Francisco, California.

Sylvia Pottle 11:00 a.m., July 23, 1949
2419 Durant Avenue,
Berkeley, California.

George J. Rosengren, 9:00 a.m., July 25, 1949
4220 Cabrillo Street,
San Francisco, California.

David E. Sheaffer, 10:00 a.m., July 25, 1949
1475 Guerrero Street,
San Francisco, California.

Pauline G. Smith, 11:00 a.m., July 25, 1949
26 Leona Terrace,
San Francisco, California.

Leslie T. Wheeler, 1:30 p.m., July 25, 1949
2763 Bush Street,
San Francisco, California.

Viola M. Williams, 2:30 p.m., July 25, 1949
24 Leona Terrace,
San Francisco, California.

Globe Wireless, Ltd., sets forth the following reasons for the taking of these depositions:

1. The witnesses are all adverse parties to Globe Wireless, Ltd. in the above-entitled proceeding and the answer to the complaint in such proceeding has been served and filed.

2. Globe Wireless, Ltd. desires to take the deposition of these adverse parties for the purpose of discovery and for the use as evidence in the proceeding before the Board in accordance with the practice under Rule 26 of the Rules of Civil Pro-

cedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

3. Employees of the Board under the general supervision of the General Counsel of the Board and the Regional Director for the Twentieth Region have taken statements from supervisory employees of the company having the principal information with respect to the matters at issue in the proceeding and, we are informed and believe, have taken statements from some or all of the other parties. Such statements are, under the usual practice of the attorneys on the staff of the General Counsel of the Board, made use of by such attorneys in preparation for and in the course of the trial of the proceeding under Section 10.

4. The depositions will furthermore give counsel for Globe Wireless, Ltd., with respect to the witnesses whose depositions are asked, equal treatment to that accorded to attorneys for the General Counsel of the Board in view of the availability to them of statements taken from supervisory employees of Globe Wireless, Ltd., and from other persons who might have testimony relevant to the issues of the dispute.

5. A party to a proceeding before a District Court of the United States or a state court in the State of California would, as a matter of right, be entitled to take the depositions called for in this application.

6. Provisions of Section 11 authorize the taking of these depositions and provide for the issuance of subpoenas in connection therewith (See Legislative History of the Labor-Management Relations Act, 1947, pages 16, 201, 334, and 562).

7. The taking of the depositions will contribute to a more expeditious and orderly trial of the matter before the Trial Examiner just as does the comparable practice so contribute to expeditious and orderly trial before the state and federal courts. The taking of the depositions will give counsel for Globe Wireless, Ltd., full knowledge of the evidence that may be available and will permit him to judge whether there may be any cumulative evidence and will otherwise permit him to prepare adequately for the trial in accordance with the usual practice of preparing for trial in the federal and state courts. Since a trial before the Board should be an attempt to present the true facts rather than a battle of wits between counsel, these depositions should be ordered and the subpoenas issued.

8. The application for subpoenas directed to the persons named herein to testify by deposition, which is filed this day with the Board's Office for the Twentieth Region, states, with full particularity, the nature of the testimony sought and shows why it relates to the matters before the Board in the above-entitled proceeding.

Dated: July 14, 1949.

Respectfully submitted,

GLOBE WIRELESS, LTD.,

By /s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,
BROBECK, PHLEGER &
HARRISON,

Its Attorneys.

Service admitted.

Received July 26, 1949.

GENERAL COUNSEL'S EXHIBIT No. 5(c)

Case No. 20-CA-193

[Title of Board and Cause.]

APPLICATION FOR SUBPOENA

Globe Wireless, Ltd., a party to the above-entitled proceeding, hereby applies for the issuance of subpoenas to the persons named below, each of whom is a party to the above-entitled proceeding and a party adverse to applicant, such subpoenas to direct them to appear before Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, at Room 1100, 111 Sutter Street, San Francisco, California, in the offices of Messrs. Brobeck, Phleger & Harrison, beginning at 9:30 a.m., July 21, 1949, as follows:

Albert E. Hinde, 9:30 a.m., July 21, 1949
2841 Sacramento Street,
San Francisco, California.

Charles A. Jones, 10:30 a.m., July 21, 1949
204 Park Street,
Redwood City, California.

Rudolph W. Niemi, 2:00 p.m., July 21, 1949
147 Arch Street,
San Francisco, California.

Malcolm G. Parks, 3:00 p.m., July 21, 1949
1840 Sunnydale Avenue,
San Francisco, California.

Bruce B. Risley, 4:00 p.m., July 21, 1949
House 598,
Marin City, California.

each of said witnesses at the time set forth after his name there to give testimony by deposition upon oral examination for the purpose of discovery and for use as evidence in the proceeding before the Board. The testimony to be produced shall be the information in the possession of the witness with respect to:

1. The reasons for the discharge of Charles A. Jones, on or about January 21, 1949.

2. The occurrences on January 21 and 22, 1949, in Globe's operating room and/or in the office of Mr. McPherson in connection with the discharge of Mr. Jones and any and all discussions, conferences, meetings and actions in connection therewith.

3. The acts of the witness and others, individually or in concert with others, during the period beginning January 21, 1949 and ending with the withdrawal of the picket line in connection with the picketing of Globe Wireless, Ltd.

4. The efforts of the witness, individually and/or in concert with others, on behalf of himself, or him-

self and others, to obtain his or their return to work at Globe Wireless, Ltd. after January 21, 1949.

5. The nature and extent and techniques of planning and effecting concerted action with his fellows directed against Globe Wireless, Ltd., during the period following knowledge of the discharge of Charles A. Jones.

6. Any and all acts of Globe Wireless, Ltd., directly or through its agents, referred to in the charge bearing the name of the witness as having interfered with, restrained or coerced the witness or other employees in the exercise of the rights to join and assist and bargain through American Communications Association, CIO.

7. Any and all acts of Globe Wireless, Ltd., directly or through its agents, referred to in the charge bearing the name of the witness as having by discrimination in regard to hire or tenure of employment or terms or condition of employment discouraged membership in American Communications Association, CIO, or encouraged membership in any other labor organization rival of American Communications Association, CIO.

8. Any acts, after August 25, 1948, of American Communications Association, CIO, or its agents, to restrain or coerce any employees of Globe Wireless, Ltd., in the exercise of their rights to refrain from joining, assisting or bargaining through American Communications Association, CIO.

9. Any acts after August 25, 1948 of American Communications Association, CIO, or its agents, to

cause or attempt to cause Globe Wireless, Ltd. to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage membership in American Communications Association, CIO, or discourage membership in any labor organization rival of American Communications Association, CIO.

10. Any act after January 21, 1949 of American Communications Association, CIO, or its agents, inducing or encouraging employees of any employer other than Globe Wireless, Ltd. to refuse to perform services with respect to messages originating on or carried by or destined to the radio telegraphy system of Globe Wireless, Ltd. where a purpose of such action was to force or require such other employer to cease dealing with Globe Wireless, Ltd.

11. The facts as to all acts of the witness and other individuals named in the complaint, individually and/or in concert with others, in connection with the planning, preparing and filing of the charge bearing the name of the witness and attached to the complaint.

Dated: July 13, 1949.

Respectfully submitted,

GLOBE WIRELESS, LTD.,

By /s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHLEGER &
HARRISON,

Its Attorneys.

Received July 26, 1949.

Service admitted.

GENERAL COUNSEL'S EXHIBIT No. 5(d)

Case No. 20-CA-193

[Title of Board and Cause.]

APPLICATION FOR SUBPOENA

Globe Wireless, Ltd., a party to the above-entitled proceeding, hereby applies for the issuance of subpoenas to the persons named below, each of whom is a party to the above-entitled proceeding and a party adverse to applicant, such subpoenas to direct them to appear before Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, at Room 1100, 111 Sutter Street, San Francisco, California, in the offices of Messrs. Brobeck, Phleger & Harrison, beginning at 9:00 a.m., July 22, 1949, as follows:

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1315 Grove Street,
San Francisco, California.

John Gyuresik, 1:30 p.m., July 22, 1949
359 Vallejo Street,
San Francisco, California.

Virginia Kelso, 2:30 p.m., July 22, 1949
529 Masonic Avenue,
San Francisco, California.

Violet A. Leach, 3:30 p.m., July 22, 1949
221 Clipper Street,
San Francisco, California.

Jesse E. McLin, 4:30 p.m., July 22, 1949
107 East Vista Avenue,
Daly City, California.

Homer E. Mulligan 9:00 a.m., July 23, 1949
166 Gaven Street,
San Francisco, California.

Louis Pena, 10:00 a.m., July 23, 1949
227 Dore Street,
San Francisco, California.

Sylvia Pottle, 11:00 a.m., July 23, 1949
2419 Durant Avenue,
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George J. Rosengren, 9:00 a.m., July 25, 1949
4220 Cabrillo Street,
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1475 Guerrero Street,
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26 Leona Terrace,
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2763 Bush Street,
San Francisco, California.

Viola M. Williams, 2:30 p.m., July 25, 1949
24 Leona Terrace,
San Francisco, California.

each of said witnesses at the time set forth after his name there to give testimony by deposition upon oral examination for the purpose of discovery and for use as evidence in the proceeding before the Board. The testimony to be produced shall be the information in the possession of the witness with respect to:

1. The reasons for the discharge of Charles A. Jones on or about January 21, 1949.

2. The occurrences on January 21 and 22, 1949, in Globe's operating room and/or in the office of Mr. McPherson in connection with the discharge of Mr. Jones and any and all discussions, conferences, meetings and actions in connection therewith.

3. The acts of the witness and others, individually or in concert with others, during the period beginning January 21, 1949 and ending with the withdrawal of the picket line in connection with the picketing of Globe Wireless, Ltd.

4. The efforts of the witness, individually and/or in concert with others, on behalf of himself, or himself and others, to obtain his or their return to work at Globe Wireless, Ltd. after January 21, 1949.

5. The nature and extent and techniques of planning and effecting concerted action with his fellows directed against Globe Wireless, Ltd. during the period following knowledge of the discharge of Charles A. Jones.

6. Any and all acts of Globe Wireless, Ltd., directly or through its agents, referred to in the charge

bearing the name of the witness as having interfered with, restrained or coerced the witness or other employees in the exercise of the rights to join and assist and bargain through American Communications Association, CIO.

7. Any and all acts of Globe Wireless, Ltd., directly or through its agents, referred to in the charge bearing the name of the witness as having by discrimination in regard to hire or tenure of employment or term or condition of employment discouraged membership in American Communications Association, CIO, or encouraged membership in any other labor organization rival of American Communications Association, CIO.

8. Any acts, after August 25, 1948, of American Communications Association, CIO, or its agents, to restrain or coerce any employees of Globe Wireless, Ltd. in the exercise of their rights to refrain from joining, assisting or bargaining through American Communications Association, CIO.

9. Any acts after August 25, 1948, of American Communications Association, CIO, or its agents, to cause or attempt to cause Globe Wireless, Ltd. to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage membership in American Communications Association, CIO, or discourage membership in any labor organization rival of American Communications Association, CIO.

10. Any act after January 21, 1949, of American Communications Association, CIO, or its agents, in-

ducing or encouraging employees of any employer other than Globe Wireless, Ltd. to refuse to perform services with respect to messages originating on or carried by or destined to the radio telegraphy system of Globe Wireless, Ltd. where a purpose of such action was to force or require such other employer to cease dealing with Globe Wireless, Ltd.

11. The facts as to all acts of the witness and other individuals named in the complaint, individually and/or in concert with others, in connection with the planning, preparing and filing of the charge bearing the name of the witness and attached to the complaint.

Dated: July 14, 1949.

Respectfully submitted,

GLOBE WIRELESS, LTD.,

By /s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHLEGER &
HARRISON,

Its Attorneys.

Service admitted.

Received July 26, 1949.

GENERAL COUNSEL'S EXHIBIT No. 6

United States of America

Before the National Labor Relations Board

Twentieth Region

Case No 20-CA-193

In the Matter of

GLOBE WIRELESS, Ltd.

and

LORRAINE E. CONGER, LILLIE I. FRIEND,
PAUL GUERRERO, JOHN GYURCSIK,
ALBERT E. HINDE, CHARLES A. JONES,
VIRGINIA KELSO, VIOLET A. LEACH,
JESSE E. McLIN, HOMER E. MULLIGAN,
RUDOLPH W. NIEMI, MALCOM G.
PARKS, LOUIS PENA, SYLVIA POTTLE,
BRUCE B. RISLEY, GEORGE J. ROSEN-
GREN, DAVID E. SHEAFFER, PAULINE
SMITH, LESLIE T. WHEELER, VIOLA H.
WILLIAMS,

Individuals.

ORDER

Applications for the taking of depositions and applications for subpoenas in connection therewith having been filed by Globe Wireless, Ltd., on July 13 and 14, 1949, and the matters set forth therein having been duly considered,

It Is Hereby Ordered that, good cause for the

taking of depositions not having been shown, the applications therefor be, and the same hereby are, denied, and

It is Hereby Further Ordered that the applications for subpoenas, being in connection with and dependent upon the applications for depositions, be, and the same hereby are, likewise denied, without prejudice to the making of written applications for subpoenas returnable at the hearing heretofore scheduled in the above-entitled proceedings.

/s/ GERALD A. BROWN,
Regional Director, Twentieth Region, National
Labor Relations Board.

Received July 26, 1949.

GENERAL COUNSEL'S EXHIBIT No. 7

Western Union
[Telegram]

July 20, 1949.

Straight Wire
National Labor Relations Board,
Washington, D. C.

Re Globe Wireless Et Al. Case No. 20-CA-193.
We Hereby Request Under Section 102.26 of the Board's Rules and Regulations Special Permission to Appeal to the Board Directly from the Order of the Regional Director for the Twentieth Region Received July 19, 1949, Denying Issuance of Subpoenas, Issuance of Which Was Required by Sec-

tion 102.31 of the Board's Rules and Regulations and Section 11(1) of the Act, Due and Timely Application Having Been Made Therefor. Since Respondent Would be Irreparably Deprived of Its Right to Due Process of Law and to the Fair Hearing Required by Statute if the Taking of Evidence in the Hearing Precedes the Issuance and Compliance with Said Subpoenas for That Would Preclude Respondent from Preparing and Presenting the Case as He Is Entitled, We Further Request Order Continuing July 26 Hearing Until Board Considers Appeal, Issues Subpoenas and There Is Compliance Therewith. Copy of This Telegram Is Being Served on the Parties and the Regional Director for the Twentieth Region.

BROBECK, PHLEGER &
HARRISON.

Received July 26, 1949.

GENERAL COUNSEL'S EXHIBIT No. 8

[Teletype]

Book SF

July 21, 1949.

Washington 7-21-49 513PM

Re—Globe Wireless Et Al, 20-CA-193, the Board Upon Consideration Today Has Denied Without Prejudice Application Made for Special Permission to Appeal from Regional Director's Refusal to Issue Subpoenas. The Board Will Consider This Matter

Upon a Review of the Record if Raised for Its Consideration Pursuant to Section 203.46 of the Board's Rules and Regulations. The Board Also Denies Request for Order to Continue the Hearing for Same Reason.

NATIONAL LABOR
RELATIONS BOARD.

20-CA-193 203.46

GM524PM

Received July 26, 1949.

* * *

Mr. Ernst: I assume that would give us the opportunity to raise the question as to the lawful issuance of the Complaint at a later date?

Trial Examiner Ruckel: It may be raised in oral argument or by brief.

Mr. Ernst: Or by brief directed to the matter?

Trial Examiner Ruckel: Well, as to the "evidence" I am not so sure, that is the matter of the alleged non-compliance of the Union which is not the charging party in this case.

Mr. Ernst: I think that is a matter of fact that we will have to determine from the evidence.

Trial Examiner Ruckel: Well, if it is a matter of fact it is a matter of administrative fact which has been determined administratively by the General Counsel. The Trial Examiner does not propose to go into the question of whether the General [22] Counsel was correct on all of the evidence which he had, or which he might adduce

in issuing the Complaint. It is all an administrative matter. That has been consistently held by the Board ever since the Taft-Hartley.

* * *

Mr. Ernest: Then I move to dismiss the proceeding entirely on the ground that there is a refusal by the Examiner to permit any evidence to be considered as to whether or not the charges were filed by a non-complying Union. At least, that is what I understand your ruling to be.

Trial Examiner Ruckel: Is there objection to that motion?

Mr. Berke: Yes, there is, Mr. Trial Examiner, very definitely.

Trial Examiner Ruckel: The motion was denied.

Do you mean your position also to include the contention that the General Counsel, or that the General Counsel issued the Complaint without the compliance of this Union?

Mr. Ernst: That is the substance of my objection.

Trial Examiner Ruckel: Well, I will not let you go into the evidence as to whether or not it has complied with the Act in that respect. [23]

Mr. Ernst: Well, how about the evidence as to who actually filed these charges?

Trial Examiner Ruckel: Well, it is quite clear as to who actually filed these charges, they were filed by these individuals.

Mr. Ernst: I don't think it is clear at all, Mr. Examiner.

Trial Examiner Ruckel: Yes. You don't pro-

pose to go into the matter as to whether or not they if that is the substance—fronted for the Union.

Mr. Ernst: Yes. We cannot go into that, as I understand the ruling? [24]

* * *

Mr. Berke: I have no further formal exhibits, Mr. Trial Examiner.

At this time I move that the entire seventh defense, being Paragraphs 12 through 17, both inclusive, in the Respondent's Answer, and the 8th and 9th defenses, being Paragraphs 18 and 19, respectively, in Respondent's Answer, be stricken from the record, and from the Answer.

Trial Examiner Ruckel: Will you repeat again those paragraphs, please?

Mr. Berke: Yes, in the seventh defense, on Page 7 of the Answer, Paragraphs 12 through 17, both inclusive, and the 8th and 9th defenses on Page 9 of the Answer, being Paragraphs 18 and 19. They are irrelevant and immaterial and incompetent to the issues involved in this hearing. They are couched in the language of Section 8 (b). If they are intended to be charges they are improperly filed as such. I therefore move that they be stricken.

Mr. Ernst: Well, I don't understand at the moment what your position is as to the sixth defense [25]

Mr. Berke: I didn't say the sixth defense.

Mr. Ernst: I thought a moment ago, in response to the Trial Examiner's question, you said

you were going to move to strike the sixth defense. [26]

Mr. Berke: The seventh.

Mr. Ernst: What about the sixth? Is that okay?

Mr. Brotsky: In order to get that before the Trial Examiner, I will move that the sixth defense be stricken on the ground that it is irrelevant and immaterial as a matter of law, it does not constitute a defense to the present proceeding, is not the allegation of facts which are required by the Rules and Regulations of the Board to be stated in the answer, and, further, and finally, that the sixth defense is an administrative matter within the discretion of the Board, and not the subject of evidence to be introduced at this hearing.

Mr. Berke: And Counsel for the General Counsel joins in that motion.

Trial Examiner Ruckel: Well, as I have indicated, I am of the opinion that should be dismissed because it is a matter with which we are not concerned.

I take, of course, there is an objection to the motion?

Mr. Ernst: Yes.

Trial Examiner Ruckel: The objection is——

Mr. Ernst: I believe——

Trial Examiner Ruckel: The objection is overruled. The motion to strike is allowed.

Mr. Ernst: The motion to strike is what?

Trial Examiner Ruckel: Is allowed. [27] ..

Mr. Ernst: That as is as to the sixth, seventh, eighth and ninth defenses?

Trial Examiner Ruckel: That is correct.

Mr. Berke: May we go off the record?

Mr. Ernst: In other words, the Board is not going to go into the question of what relief is appropriate under the Act? It seems to me—well, I don't want to argue the points now.

Trial Examiner Ruckel: We won't go into that now. It was raised in the answer, it was not raised in the complaint.

* * *

Mr. Berke: Mr. Trial Examiner, in off the record discussion with Counsel for the Respondent we have agreed to a stipulation with respect to commerce, and Counsel for the Respondent will read the proposed stipulation.

Mr. Ernst: It is hereby stipulated by and between Globe Wireless, Ltd. (hereinafter called the "Company") and [28] the National Labor Relations Board for the purposes of this proceeding alone and without prejudice to any other proceedings to which the Company is or may be a party, as follows:

1. The Company is and has been at all times herein mentioned a corporation organized and existing under the laws of the State of Nevada.

2. The Company is engaged in the business of transmitting messages by radio between Havana, Cuba, New York, New York, San Francisco, California, Honolulu, T. H., Manila, P. I., Shanghai, China, and ships at sea.

3. During the calendar year 1948 the Company

collected in excess of \$50,000 for its services rendered in such transmission of messages.

4. The Company agrees that its operations affect the flow of commerce among various states and with foreign countries and is engaged in interstate commerce within the meaning of the Act.

Trial Examiner Ruckel: Within the meaning of the Act?

Mr. Ernst: Within the meaning of the Act.

Mr. Berke: That stipulation is agreeable to Counsel for the General Counsel, and in that connection I should also like to call the attention of the Trial Examiner to the fact that the Respondent in its answer, which is General Counsel's Exhibit 4, had admitted the allegations of paragraph one of the complaint in this hearing, which bears on the issue of [29] commerce.

Trial Examiner Ruckel: Are there any further stipulations or motions? If not, call the first witness for General Counsel.

Mr. Berke: Yes, there is further stipulation, which was agreed to in the off the record discussion between Counsel for the General Counsel and Counsel for the Respondent, that the American Communications Association, affiliated with the Congress of Industrial Organizations is a labor organization within the meaning of the Act.

Trial Examiner Ruckel: Is that agreed to?

Mr. Ernst: That is agreed to.

* * *

CHARLES A. JONES

a witness called by and on behalf of the General Counsel of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Mr. Ernst: Mr. Examiner, before the commencement of the examination of this witness, I would like to ask whether any of the people—I note there are about 14 other people in the room behind the bar—are some of the parties named on the charges and the complaint? If so, I should like to move that they be excluded from the hearing room during the [30] course of the examination of any one of the witnesses, all of the other prospective witnesses who are referred to in my application for subpoena and that the Attorney for the General Counsel and for the individuals said would be produced to testify.

* * *

The motion to exclude is denied as to the individuals named in the complaint. It is granted as to other individuals, as I have stated, if Counsel will call my attention to their presence.

* * *

Direct Examination

By Mr. Burke:

Q. Mr. Jones, were you ever employed by the Globe Wireless? A. Yes.

Q. When were you first employed by them? [36]

A. On February 22, 1947.

Q. And when were you last employed there?

(Testimony of Charles A. Jones.)

A. The last day that I worked was January 20, 1949.

Q. What was your position on January 20, 1949?

A. I was paid as a point to point radio operator but classified as a A.P.O.

Q. What does A.P.O. stand for?

A. Automatic printer operator.

Q. And does that indicate the type of machine that you operated? A. Yes.

Q. What watch or shift were you on on January 20th? A. Noon until eight p.m. [37]

* * *

Q. Now, when you went to work for Globe, were you a member of any union?

A. I was a member of the American Communications Association, CIO.

Q. And did you continue that membership while you were working for Globe? A. I did.

* * *

Q. (By Mr. Berke): Now, when you first went to work for Globe, was there a collective bargaining contract between Globe and ACA? [41]

A. There was.

Q. And do you know when that contract expired?

A. The last contract expired on August 15, 1948.

Q. And were you a member of any committee of that union while working for Globe?

A. I was a member of the Shop Committee, and served on the Grievance Committee.

(Testimony of Charles A. Jones.)

Q. Now, as a member of these various committees did you have occasion to meet with representatives of management? A. I did.

Q. And as a member of the Negotiating Committee did you meet with representatives of management in an effort to negotiate a new contract to replace the one that expired on August 15, 1948?

A. I did.

* * *

Q. After the contract had expired, were the employees represented by any committee in the shop? [42]

A. Yes. We were allowed to meet with them.

Q. Were you a member of that committee?

A. I was a member of the committee.

Trial Examiner Ruckel: Did the committee have a name?

The Witness: It was generally thought of as the Grievance Committee.

Q. (By Mr. Berke): And would you meet with management concerning grievances? A. Yes.

Q. Were you at times chairman of that committee?

A. On two different instances I was Acting Shop Chairman.

Q. Tell us whether or not your name ever appeared on any notices or bulletins that may have been posted in connection with your union concerted activities? A. Many of them.

Q. Now, who were some of the representatives of management that you met with from time to time?

(Testimony of Charles A. Jones.)

A. We met with Mr. McPherson.

Q. What is Mr. McPherson's capacity?

A. General Manager. Sometimes he would have Mr. Albertson.

Q. Who is Mr. Albertson?

A. I believe he was an engineer, radio engineer of some kind. Mr. McPherson also had with him at various times the manager from New York, whose name I don't recall. One of the [43] managers from the Far East was there on one occasion, Mr. Neil Brown.

Q. Who is Mr. Brown?

A. Mr. Brown is the superintendent, as far as I know.

* * *

Q. (By Mr. Berke): Well, taking the period from August 15, 1948, to January 20, 1949, who was your supervisor?

A. My supervisor was Mr. Bash.

Q. Is that Leo Bash? A. Leo Bash.

Q. What is his title? A. Chief operator.

Q. Was Mr. Bash ever present at any of these meetings you had with management?

A. Yes. I failed to mention his name. He was generally there, usually.

Q. Do you know whether or not Mr. Bash could hire and fire?

A. There was a time when I understood that he could hire and fire by his own words.

Q. Could he recommend hiring and firing? [44]

A. He could do that.

(Testimony of Charles A. Jones.)

Q. Could he suspend? A. He could.

Q. Could he transfer people from one job to another or one circuit to another?

A. He could. [45]

* * *

Q. Now, when did you first go to work on the noon to eight p.m. watch?

A. I went to work on the noon to eight p.m. watch on the week of January 16th or 17th, whatever the Monday was of that week.

Q. How did you happen to go to work on that watch?

A. On a bidding period, I wasn't able to bid a four p.m. to midnight watch. I didn't have enough seniority.

Q. So you bid, as I understand it, for this noon to eight p.m. watch? And obtained it, is that correct? A. Yes. [47]

* * *

Q. Will you tell us if, during the course of your employment, a question arose with respect to lay-offs of certain individuals and a short work week? Just answer "yes" or "no."

A. Yes, sir.

Q. When did that take place?

A. In the latter part of November or early December; I am not sure.

Q. Well, will you tell us what that was about?

Trial Examiner Ruckel: 1948?

The Witness: 1948.

A. Due to the waterfront strike, and the com-

(Testimony of Charles A. Jones.)

pany's claim of declining revenues, they wanted to lay off several people. In the contract which they had agreed to live up to, although they had not signed one, it stated that in the case of—— [48]

* * *

Q. (By Mr. Berke): Now, was there another occasion when you protested certain working conditions at Globe after this event you have just described? A. You mean as to grievances?

Q. Yes. A. Of individuals?

Q. Yes.

A. Yes, I acted as a representative for several people in trying to settle grievances with Bash.

Q. And who did you meet with on these occasions? [50]

* * *

A. After November 6th, at which time the company would no longer meet with our Grievance Committee, I attended a meeting in the office with Mr. McPherson, acting as a representative of Bruce Risley.

Q. Was Mr. Risley an employee of Globe?

A. He was.

Q. Doing the same type of work you were doing?

A. Approximately.

Q. Were there other special occasions after November 6th? A. There were.

Q. 1948?

A. There were several occasions where we met with Bash in the operating room to protest the violations.

(Testimony of Charles A. Jones.)

Q. Was there an occasion when you met with management with respect to—— [51]

* * *

A. I recall on December 24, 1948, when Pauline Smith told me of the violation in connection with holiday work and pay, in which we got into a discussion, but partly through my efforts were settled to Miss Smith's satisfaction.

* * *

Trial Examiner Ruckel: Where is the union's bulletin board?

The Witness: It was in the operating room, behind the Shanghai circuit.

Q. (By Mr. Berke): Was that bulletin board in the operating room all through the period that you were employed there? A. Yes.

Q. Was there any period when there was a question concerning that bulletin board?

A. The board was removed for a short period of time somewhere about August 15, 1948. I believe I was on my vacation [53] and when I returned it was still down.

Q. And this was after the contract between the ACA and Globe had expired, was it?

A. Yes, sir.

Q. Did you participate in any negotiations with management concerning that bulletin board?

A. I was a member of the Committee at at least one meeting trying to get the company to return the board.

(Testimony of Charles A. Jones.)

Q. And do you know when that meeting took place at which you were present?

A. No, I don't; after the contract——

Q. When did you come back from your vacation?

A. I would imagine about August 17th, I guess about the 17th or 18th of August, 1948.

Q. And how long after you returned from your vacation did you take part in this meeting?

A. I would say within a week.

Q. So that it would be about the 24th or 25th of August, would it? Somewhere in there.

Q. 1948? A. Yes, sir.

Q. Who did you meet with on that occasion?

A. I remember that Mr. McPherson was there. I don't recall any others. [54]

Q. Was Mr. Bash there to your knowledge?

A. I couldn't say.

Q. In any event, as a result of the meeting, tell us whether or not the board was restored?

A. The company agreed to return the board to its place on the wall along with some bulletins that had also been removed along with it.

* * *

Q. What happened on January 19th?

A. I came to work at noontime, and at some period between noon and two o'clock I made a lunch relief on the Honolulu circuit. [55]

* * *

Q. All right, go ahead and tell us what occurred after this lunch relief?

(Testimony of Charles A. Jones.)

A. After the lunch relief on Honolulu I returned to Shanghai circuit, which was the usual thing, and at some time between then and 4:00 o'clock Bash came back to the circuit with the copies of three messages that I had punched to Honolulu and pointed out to me that I was using the wrong form, and showed me a copy of the correct Globe Form, and I told him that I had been using this form on international circuits for years, but that if Globe wanted it done differently I could change my form, comply. [56]

* * *

Q. What happened then on January 20th, the next day?

A. On January the 20th I came to work as usual at noon, and I don't remember where I was assigned, there was no regular schedule to follow, often times the Supervisor would tell me to help around the place, I might sit down at Manila for a while, I might be a clerk, that is office manager, or someone. New York might ask me to relieve them for lunch, the New York [58] operator. But along about, oh, I guess somewhere around 2:00 o'clock in the afternoon I had occasion to go back to ask Mr. Bash if I could see this bulletin once more, there was some little thing about the form that I still was not too sure of, and he got the form out and showed it to me. While I was back there talking to him I remarked to him that under the

(Testimony of Charles A. Jones.)

circumstances I suspected that they were going to pick my work to pieces, but that I didn't intend to take it.

Q. What did you mean by "under the circumstances"?

Mr. Ernst: Well, now, wait a minute. I object to——

Trial Examiner Ruckel: Objection sustained.

This conversation was with Mr. Bash?

The Witness: Yes.

Trial Examiner Ruckel: Give us the whole conversation. How did you happen to go to him? Oh, you went to him about this form?

The Witness: I went to check on the form.

Trial Examiner Ruckel: Right. How did you get into the question of your work?

The Witness: Under the tension and unfriendliness of this particular shift in the office I felt that——

Trial Examiner Ruckel: Which particular shift now do you mean?

The Witness: The noon to 8:00 shift.

Trial Examiner Ruckel: By the "unfriendliness of the [59] shift" you mean the unfriendliness of whom?

The Witness: At the office, the unfriendliness of the other people in there. There was only one union member, ACA Union member on that shift.

* * *

Trial Examiner Ruckel: Well, tell us about the other persons on the shift.

(Testimony of Charles A. Jones.)

The Witness: Well, there were two other ACA members on the shift, and the other were anti-ACA, or anti-Union.

Trial Examiner Ruckel: How many were on the shift?

The Witness: There were six or eight. [60]

Trial Examiner Ruckel: Operators?

The Witness: And clerks.

Trial Examiner Ruckel: And clerks.

Q. (By Mr. Berke): All right, proceed with the conversation that you had with Mr. Bash.

A. I said to Mr. Bash, "I suspect that you are going to pick my work to pieces, that you are going to find every little——"

Trial Examiner Ruckel: Before we get into that I want to be sure that there was not something else said before you made that remark. You asked him about this form, you asked to see that form that was posted because you were not certain that you were using the right form; is that correct?

The Witness: That is correct.

Trial Examiner Ruckel: Or using it exactly correctly. And will you tell us the conversation about that, about the form.

The Witness: I simply asked him to show me the bulletin that he had showed me the previous day, that I wanted to check with one little——

Trial Examiner Ruckel: So he showed it to you?

The Witness: He showed it to me.

Trial Examiner Ruckel: And then did you say anything further about the form, or did he?

(Testimony of Charles A. Jones.)

The Witness: No, nothing more was said about the form.

Trial Examiner Ruckel: Nothing said by you or by him as to whether you were using the form properly, or any comment at [61] all about the form?

The Witness: No.

Trial Examiner Ruckel: And the next thing that was said was when you made the remark which you have just told us about, is that it?

The Witness: That is right.

Q. (By Mr. Berke): Did you say anything more in addition to the remark about your work being picked to pieces? Give us that conversation.

A. I said, "I realize you are going to look for every little flaw in my work, you are going to pick it to pieces, and I am not going to take it." [62]

* * *

Q. Did anything more happen that day?

A. Shortly after that Bash came up to the circuit and said something about the form, or had some papers in his hand, and I called to his attention that this—that these three messages had been handed to him by a fink, Bruce, a woman, that it had always been my idea as an operator that if someone made a mistake they would show it to the person or tell him about it, and not run to the boss.

Q. That is what you told Bash?

A. That is what I told Bash.

Trial Examiner Ruckel: Didn't he say something to you before you told him that when he came up with these forms, these copies?

(Testimony of Charles A. Jones.)

The Witness: I don't recall just how he opened the conversation, but he replied by saying "You would call a woman a 'fink' but you wouldn't dare call a man a 'fink.' If you called me that I would answer that with violence."

This was in a bellicose voice, and he had a roar as usual. I said to him, "You have been referring to me as a Communist, and if you call me that I will attempt to answer that with violence."

He says, "I don't say that you are a Communist, I say that you are a fellow traveler."

I said, "I don't know what you mean by that," and he [63] walked away.

Q. (By Mr. Berke): Now, who was this person, "Bruce" that you referred to in your conversation with Mr. Bash?

A. Bruce is an APO operator, she has been there for some time longer than I have.

Q. Was she a member of the ACA?

A. She had been a member of the ACA.

Q. Was she a member then? A. No.

Q. Do you know whether or not she was a member of any other labor organization?

A. I don't know for sure about that, but she served as an observer during the Labor Board election held——

Q. For what Union? A. For the IBEW.

Q. Do you know when that Labor Board election was held?

A. It was held in the latter part of September.

(Testimony of Charles A. Jones.)

Q. What year? A. 1948.

Q. Was that after the contract between the ACA and the Company had expired? A. Yes. [64]

* * *

Q. Did anything more happen that day, that is, January 20, 1949?

A. While I was on my lunch period between 4:00 and 4:30 Mr. Bash came to the rest room and called me aside, and said, "Your work is not satisfactory."

I said, "Is that in quality or quantity?"

He said, "Quantity."

He says, "I want you to speed up in your punching, I want you to punch faster."

He says, "I want you to go over on Shanghai at 4:30 and during your idle moments I want you to practice punching this machine."

I said to Leo, "Well, that is an insult, and I will have to accept it as such."

He says, "Are you going to do it," or previous to this I had said, "Well, I am punching my fastest, and in keeping with the standard of work that I turn out I couldn't very well send any faster."

He says, "Well, are you going to practice?"

I said, "No." [67]

* * *

Q. Did you report for work the next day, January 21st?

A. I reported for work, I was a few moments late, I think about 12:08 or 12:10.

(Testimony of Charles A. Jones.)

Q. Did you go to work that day? A. No.

Q. What happened?

A. Well, I went to the card rack where our time cards were kept, near the time clock, and my card was missing from its regular place, so I went over to Leo and asked him if he had my card, and he said "No, you won't need a card." I was surprised. He said, "I want you to come on inside with me."

Q. Where was "inside"?

A. Into Mr. McPherson's office, or Mr. Brown's. I didn't know where we were going. "Inside" was the way he said.

Q. Did you go right in with him?

A. Before going in I wanted to take a representative, so I [69] said to Bash, "Just a moment until I get a representative. I will ask Niemi to go in with me."

Q. What is Mr. Niemi's first name?

A. Rudolph.

Q. Is that spelled N-i-e-m-i?

A. That is correct.

Q. What happened when you asked to take him with you?

A. He said, "You won't need Niemi for what you are going to hear."

I said, "Well, I am entitled to a representative and if I don't get one I won't be going inside."

Trial Examiner Ruckel: What was the basis for your statement that you were entitled to a representative?

(Testimony of Charles A. Jones.)

The Witness: The law.

Trial Examiner Ruckel: I beg your pardon?

The Witness: The law.

Trial Examiner Ruckel: You weren't referring to anything in Company practice or previous position of contract which they subsequently——

The Witness: No, the labor law. We had previously been questioned about our right to have a representative, and after they had legal advice they agreed that we were entitled, a man or a woman was entitled to one representative.

Q. (By Mr. Berke): That is, the Company had previously agreed to that? [70]

A. They had.

Trial Examiner Ruckel: When was that?

The Witness: When was that? Well, it was after the—it was after November the 6th, at which time the Company wouldn't meet with the whole committee.

Trial Examiner Ruckel: You say it was agreed that although they would not meet with the whole committee, that one, in the event of a lay-off, would be entitled to be represented by someone else to discuss with the Company, is that what you are trying to tell us?

The Witness: Yes, on any grievance.

Trial Examiner Ruckel: Any grievance.

Q. (By Mr. Berke): Any grievance?

A. Any grievance. No one had to go in there by themselves.

(Testimony of Charles A. Jones.)

Trial Examiner Ruckel: And that was carried out?

The Witness: It was carried out after the Company satisfied themselves it was the law.

Q. (By Mr. Berke): All right. Now, on this day, January——

Mr. Ernst: Now, wait a minute. I suggest either that the reference to “After the Company had satisfied itself as to the law” be stricken, or the witness——

Trial Examiner Ruckel: That may be stricken.

The Witness: I went——

Mr. Berke: Pardon?

The Witness: I wanted to know if I could [71] explain how this came about?

Mr. Berke: Yes, go ahead.

Trial Examiner Ruckel: You may tell us anything the Company said, or the representative said about them having satisfied themselves as to the law.

The Witness: I went in one day, I will say in December, with Bruce Risley. He wanted to find out why he was demoted, he asked me to accompany him as his representative. And Mr. McPherson questioned my right to be there as a representative. He said, “I will have to contact our attorneys and we will let you know.” It was the next day or so when he notified us that we were entitled to a representative, anyone with a complaint, and we met, and we met on several occasions.

Q. (By Mr. Berke): All right. On this day,

(Testimony of Charles A. Jones.)

January 21st, when you were asked to come into Mr. McPherson's office by Leo Bash, and you requested the right to have Mr. Niemi represent you, what occurred when you made that request?

A. Well, at first he was not going to let me take Niemi.

Q. Who was not going to let you take him?

A. Bash.

Q. What did he say?

A. He said, "You won't need Niemi with you for what you are going to hear."

Q. What did you say to that?

A. I told him that we had already established this [72] right to a representative, and that if I did not have one I would not be going inside with him.

Q. Did you get Mr. Niemi?

A. And he sputtered a while and said "O.K., take him in."

Q. This is Mr. Bash?

A. Mr. Bash.

* * *

Q. (By Mr. Berke): All right, did you get Mr. Niemi? A. I got Mr. Niemi.

Q. Did the two of you then go into Mr. McPherson's office?

A. The two of us with Bash went inside.

Q. Now tell us what took place in Mr. McPherson's office.

A. Well, first of all, Mr. McPherson wanted to know what Niemi's status was there, and he stated that he was representing me. Mr. McPherson then

(Testimony of Charles A. Jones.)

said to me, "I have a complaint from a Supervisor that your work is not satisfactory." He said, "I understood that he told you to practice punching, to speed up punching, and you refused. Is that so? Is that right?"

I said, "That was intended only as an insult to me, I [73] accepted it as such, and I refused to practice."

Q. Was anything else said by anyone?

A. Niemi tried to get a word in, he was interrupted by Mr. Bash, but finally managed to say that the whole trouble in that place, inside, was Bash's fault, and if anyone was being fired it should be Bash, also that he expected to be fired for coming in there and representing me.

Q. Did Niemi say anything more than that?

A. He said that I was a good operator, or a first class operator.

* * *

The Witness: Niemi said I was a first-class operator, one of the best operators he had ever worked with, which he had been for many years.

* * *

The Witness: The only thing that I recall after that was Mr. McPherson said my check would be mailed out to me, that I was fired.

Q. (By Mr. Berke): What was his language as [75] you recall it?

A. "That I will—that if you have refused to practice punching I will have to replace you with

(Testimony of Charles A. Jones.)

someone else, you are fired. I will mail you the check home, to your home."

Q. Did you later get your check?

A. After some delay, a week or ten days. [76]

* * *

Direct Examination

(Continued)

By Mr. Berke:

Q. Mr. Jones, just before recess for the noon hour I believe you testified that Mr. McPherson among other things, told you that you were fired, that you were given your pay check, is that correct?

A. That is right.

Q. And you did subsequently receive your pay check in the mail, as I understand?

A. Yes.

Q. What did you do after you had been told that you were fired?

A. I left the building, cleaned out my locker, left the building, and went to the union hall.

Q. Was that the A.C.A. union hall?

A. A.C.A. union hall.

Q. And what did you do there?

A. In the early part of the week, either on a Monday [77] or Tuesday, the Shop Chairman had posted a notice that there would be meetings held on Friday, January 21, 1949, in two parts; that is, one meeting would be at 1:30 and the other meeting would be at 8:00 p.m.

Q. These were regularly scheduled meetings, were they?

(Testimony of Charles A. Jones.)

A. Regularly scheduled, regular scheduled shop meetings.

Q. And you went to that 1:30 meeting, did you?

A. I did.

Q. And did the matter of your discharge come up at that meeting? A. Yes.

Q. Was there any decision made at that meeting as to what would be done about your discharge?

A. A decision was made that the Shop Chairman and myself would go to the Company operating room and protest the firing, that is, would lodge a formal objection to the firing with the Company.

Q. Who was the Shop Committee Chairman?

A. The Shop Chairman was Malcolm Parks.

Trial Examiner Ruckel: Is he employed by the Globe Wireless?

The Witness: Yes.

Trial Examiner Ruckel: And this union, did it include employees other than employees of the Globe Wireless?

The Witness: Yes. This was a shop meeting for Globe [78] Wireless employees only.

Q. (By Mr. Berke): Was there anything else decided at that meeting in connection with your discharge?

A. Well, as I have stated, that we would protest or that the Shop Chairman would formally protest the discharge. I don't remember other matters that were taken up.

(Testimony of Charles A. Jones.)

Q. All right. Did you then later that day return to the operating room of Globe Wireless?

A. We did.

Q. What time was that?

A. Well, it was somewhere between 4:10 and 4:15 that we reached the operating room.

Q. Who accompanied you?

A. Malcolm Parks, Shop Chairman.

Q. And where did you go in the operating room and whom did you see?

A. As I recall, the Chief Operator Bash was back at what is called the Supervisor's desk, and Parks approached him and said that he wished to formally protest the firing.

* * *

Trial Examiner Ruckel: What did he say and what [79] did you say?

The Witness: I didn't say anything.

Trial Examiner Ruckel: What did Malcolm Parks say?

The Witness: Malcolm Parks said, "I want to formally protest the firing of Charles or Chuck Jones."

Q. (By Mr. Berke): Where were you standing or sitting at the time?

A. Well, I was probably—I was slightly to the rear of Parks, in back of him.

Q. And could you hear what was being said?

A. Yes, I could hear what was said.

(Testimony of Charles A. Jones.)

Q. Was there anything more said by either Mr. Parks or Mr. Bash?

A. Mr. Bash answered to the effect that he hadn't fired me, that he had only suspended me.

* * *

The Witness: Mr. Bash, pardon me. Mr. Bash said that he had not fired me, that he had only suspended me, that someone in the inner office had done the firing. [80]

* * *

Q. (By Mr. Berke): Will you tell us what—as best as you can recollect what Mr. Parks said and what Mr. Bash said when they got through mentioning that you had been suspended and fired by Bash?

A. He simply said, he said——

Mr. Ernst: I wonder if you would say who it is, not “he.”

Q. (By Mr. Berke): Identify who is talking.

A. Bash said, Mr. Bash said that he had not fired me, that he had only suspended me, and that he couldn't reinstate me. Mr. Parks said to Mr. Bash, “Then may we talk to the party that did the firing”? [81]

Q. What did Mr. Bash say to that?

A. I don't recall, evidently a negative answer.

Mr. Ernst: I ask that everything after the word “recall” be stricken out.

Trial Examiner Ruckel: On what ground?

Mr. Ernst: On the ground he said he didn't recall, then he said, “Evidently a negative answer.” If

(Testimony of Charles A. Jones.)

he doesn't recall how does he know it was negative, positive, or anything else?

Trial Examiner Ruckel: It may go out. [82]

* * *

Q. (By Mr. Berke): Were there other employees present?

A. There were other employees in the office.

Mr. Ernst: Excuse me. I would like to make some motions at this time if there were other employees present, and Mr. Jones is going to testify as to what was happening when other employees were present. This morning I asked that these other people be excluded from the room, and the Examiner ruled that that was improper. I move now that the cases be severed and we treat each individual case separately, and that every person who is not a party to the individual case be kept from the room while we take up that case, and then we go on to next case.

Trial Examiner Ruckel: There is only one case, there are not two cases consolidated, all you are asking is that the witnesses be separated. Again, as I said this morning, I would refuse, unless there are some other witnesses here who are not among the employees named in the complaint, and whom you expect to call as witnesses.

* * *

Trial Examiner Ruckel: Motion denied.

Go ahead and tell us what was said or done [83] by the other employees present, if anything.

(Testimony of Charles A. Jones.)

A. The other people in the office gathered around Parks, Bash and myself, and protested the firing——

Mr. Ernst: I object to the “protested”——

Trial Examiner Ruckel: What did they say, and who were they, as near as you can recall?

The Witness: I can't recall the words of the individuals. I can name some of them.

Trial Examiner Ruckel: Name as many as you can recall.

The Witness: Al Hinde, Pauline Smith, Rudy Niemi, Bruce Risley, Miss Pottle, and possibly a couple of others.

Q. (By Mr. Berke): Was Miss Williams present?

A. Viola Williams was present. [84]

* * *

The Witness: They said that they wanted [85] to get back on the circuit, that they had business to move, that they had traffic to move, that they wanted to talk to the person that had done the firing, they wanted to protest the firing, that is the gist of what each one said.

Q. (By Mr. Berke): Now, about how long did the group remain standing around Mr. Bash's desk?

A. Oh, I would say probably around 15 or 20 minutes.

Q. Will you tell us what took place after they had made their request to talk to whoever it was that had actually done the firing?

(Testimony of Charles A. Jones.)

A. About 15 or 20 minutes after we — after Parks and myself arrived Mr. Bash went to the card rack, our time cards, of their time cards, and stamped them out, stamped each one of these individuals out.

Trial Examiner Ruckel: Which individuals now?

The Witness: The ones——

Trial Examiner Ruckel: That you have previously named——

The Witness: Yes.

Trial Examiner Ruckel: As being present?

The Witness: Yes, sir.

Trial Examiner Ruckel: And when you “stamped them out,” what do you mean by that?

The Witness: That means that your pay stops for that day.

Q. (By Mr. Berke): That is, that he took the card out of [86] the rack and put it in a clock, is that it A. And sent them out.

Q. And clocked them out?

A. That is right.

Q. Then what happened after that?

A. Then he went into the inside office——

Mr. Ernst: Well,——

Q. (By Mr. Berke): Identify who went into the inside office.

A. Mr. Bash went into the inside office.

Q. Did you see him come out?

A. He came back out in a few minutes.

Q. What did he do then?

(Testimony of Charles A. Jones.)

A. Walked over to the group.

Q. That is these people that had been standing around?

A. That is right.

Q. All right.

A. And in turn offered each one of them their cards, and wanted to know if they were going back to work.

Q. What did he say to them?

A. He said, speaking to each individual, "Will you go back to work?" He offered them their cards.

Q. And what did they reply?

A. In turn they each replied that they would go back to work as soon as they could protest this firing. [87]

Q. What happened after that?

A. After all had been asked the same question, and all had answered the same, he said, "Then I will have to inform you that you are all fired."

Q. And after that announcement what took place?

A. They all continued standing there, and he said, "Go ahead and make yourself comfortable, take it easy," or "make yourself comfortable."

* * *

Mr. Ernst: Then I submit you are trying to impeach your own witness, it is improper direct examination. The witness said he didn't talk to anybody else.

Mr. Berke: I didn't ask him—— [88]

* * *

(Testimony of Charles A. Jones.)

Q. (By Mr. Berke): Where did you and the group see Mr. McPherson?

A. In the waiting room, or the entrance way to the side offices, it is inside the door, there is a waiting—there is a bench there for customers.

Q. And whose waiting room is this?

A. It is the waiting room for Mr. McPherson, Mr. Brown, or anyone else in the inside office.

Q. Was Mr. Parks present with the group and yourself? A. Mr. Parks was present.

Q. Will you tell us what was said and who said it?

A. I recall—I was standing near the door. There was so many of us, that I couldn't really get inside myself. I was standing in the back. I recall Mrs. Pottle telling Mr. McPherson that we had all been very happy, that it was a good place to work, and that she still wanted to work there, but that she couldn't take this firing by Leo Bash or this firing of Jones without making a protest, and she went on to say that the cause of all of the dissension was Mr. Bash. That is about as much of it as I got.

Q. Did Parks say anything to Mr. McPherson?

A. As I recall, he did speak to Mr. McPherson.

Q. Did you hear what he said?

A. I did not. [90]

Q. Did Mr. McPherson say anything?

A. Mr. McPherson said very little, if anything.

Q. Well, did you hear what he said?

A. Something to the effect that——

Q. No, tell us what you heard.

(Testimony of Charles A. Jones.)

A. Well, something about firing, you are fired.

Q. Well, what was it that you heard about firing?

A. Notifying the group finally that they were fired.

Mr. Ernst: Mr. Examiner, I suggest that this is a pretty crucial point and, at least, we ought to have the words.

Trial Examiner Ruckel: Give us the words as nearly as you can. Did he say that you were fired or what did he say, as nearly as you can recall his words.

The Witness: As near as I can recall it, he said, "This group is fired."

Q. (By Mr. Berke): And then what happened after that?

A. The group left the building, and I believe——

Q. Not what you believe, what you know, what you saw or heard.

A. And I recall that most of us went up to the eight o'clock meeting, appeared at the eight o'clock meeting.

Q. Were you present at that eight o'clock meeting? A. Yes, I was.

Q. What meeting was that?

A. That was the second half of the shop meeting, which was [91] scheduled so that the day people and the midnight watch could attend.

Q. And was the matter of your discharge discussed at that meeting?

(Testimony of Charles A. Jones.)

A. It was made known to the people that hadn't attended the afternoon meeting.

Q. And what was decided at that meeting?

A. It was decided that Parks and Hinde would make a further protest after midnight.

Q. Protest about what?

A. The firing of Jones.

Q. What about the firing of the four-to-midnight crew? Was there anything said about that?

Mr. Ernst: I wonder if we could not lead the witness.

Mr. Berke: I don't see anything leading about that question.

Trial Examiner Ruckel: You may answer.

A. I will say to protest the firings.

Q. (By Mr. Berke): Were you present when Parks and Hinde went to the Globe Wireless offices that night?

A. No, I was not.

Q. Tell us whether or not there was a picket line subsequently established at the premises.

A. There was a picket line established.

Q. Did you serve on that picket line? [92]

A. I did. [93]

* * *

CHARGING PARTIES' EXHIBIT No. 1

All Members/Globe Shop

The Shop Committee Has Recommended That a Delegation From This Shop Pay the Management

(Testimony of Charles A. Jones.)

a Visit in the Very Near Future, to Re-inform Them That This Shop Still Desires to Be Represented by ACA, and That the Company Should Negotiate With the Committee Elected by the Membership.

Please Hold Yourself in Readiness for the Above-Mentioned Visit, the Hour and Day to Be Announced Soon.

C. A. JONES,

Acting Vice Chairman.

Aug. 3.

Received July 26, 1949.

Q. (By Mr. Brotsky): Now you described this bulletin board. Where in the place of the company is this board? Will you describe the general layout of the room or rooms in which you worked and then tell us where the board was?

A. The Shanghai circuit, it was in the back of the Shanghai circuit, which was in the southwest corner of the room.

Q. By the way, could you give us some idea of the size of the room, estimated size? Was it larger than this room, say?

A. Yes. It would be about four times as large as this [96] room. I couldn't tell you the feet.

Q. About 30 by 60 feet then?

A. I couldn't say in feet, it would be larger than that probably.

Mr. Brotsky: Well, would you care to make an estimate, Counsel, as to the size?

(Testimony of Charles H. Jones.)

Mr. Ernst: You are putting on your case. I don't see that it is at all relevant or material.

Trial Examiner Ruckel: How is it relevant or material?

Mr. Brotsky: I am trying to get the physical description of the plant so that there may be some evidence in the record to guide the understanding of the events that have occurred that have been described. If the Examiner feels that there is no need for that sort of thing, I won't pursue it any further.

Trial Examiner Ruckel: I think it could be presumed that if it was posted on the board on the company's property, that it came to the attention of the Respondent. There is certainly a presumption to that effect.

Mr. Brotsky: I thought that it might be helpful, but I won't pursue it. [97]

* * *

Q. Now, you described a conversation you had with Bash, in which you discussed with him a grievance of Pauline Smith. Do you recall that answer? A. I do, yes.

Q. Was it a regular practice, as far as you know, to take up individual grievances with Leo Bash as chief operator?

A. Very often we did.

Q. And would he settle them on the spot in some cases? A. In some cases, yes. [99]

* * *

(Testimony of Charles H. Jones.)

Q. (By Mr. Brotsky): On the occasion of that grievance discussion, did he make a decision as to the disposition of the grievance?

A. He did.

Q. And did he inform you of his decision?

A. I don't recall whether it was Mr. Bash.

Q. Did he, at the time that he was talking to you about it, did he say what his decision was? That is all I meant.

A. Not at the time. [100]

Q. When did he later inform you?

A. It was a while later; that is, it was 20 minutes or a half hour later. I was working on the circuit.

Q. And do you recall what the grievance was?

A. The grievance had to do with a person that worked overtime on the holiday and which holiday was their regularly scheduled day off.

Q. And the person involved in this particular case was Pauline Smith, is that correct?

A. That is correct.

Q. She was working on that day on the same watch that you were?

A. She was. [101]

* * *

Cross-Examination

By Mr. Ernst:

* * *

Q. Were you with Mackey in 1934 or '35?

A. I was.

Q. Do you recall there was a strike at that time?

A. I do.

(Testimony of Charles H. Jones.)

Q. Were you a participant in that strike?

Mr. Berke: Just a moment, I object, incompetent, irrelevant and immaterial to the issues involved in this case. [106]

* * *

Trial Examiner Ruckel: Objection sustained to the last question. [107]

* * *

Q. (By Mr. Ernst): Now, do you recall that there were some meetings on the 16th and the 18th of October with respect to the shortened work week, as I recall it, union shop meetings?

A. We had union shop meetings.

Q. And at that time you discussed whether to go on it or not to go on it, is that right?

A. We discussed the lay-offs, or shorter work week, yes.

Q. And you communicated the feeling of the,—by “you” I don’t mean you personally, but the committee communicated to Mr. McPherson their position in favor of the shorter work week rather than lay-offs?

A. I believe they did.

Q. Were you one of the persons who participated in that communication?

A. I believe I did, in my recollection.

Q. That was made to McPherson, wasn’t it?

A. I wouldn’t be sure if it was to McPherson or Brown.

Q. Now, is Brown the Vice-President of the Company, or a Vice-President?

(Testimony of Charles H. Jones.)

A. I don't know what his title is.

Q. Is he sort of the top dog other than General Boatwright that you people ever deal with? [125]

A. As I recall. [126]

* * *

Q. Now, where are these, where do these messages go that you type out that are visible to yourself, I mean, are they right in front of you when you are working? A. Yes, sir.

Q. Do they sort of go into a basket at the——

A. They are gathered up at the end of the day, I imagine kept for the record.

Q. Until the end of the day they are just sort of in the basket in front? A. That is right.

Q. I suppose Bash as he walks around the room can look and see them or not as he sees fit?

A. It would be possible, as I understand it, Bash didn't say anybody brought that to his attention at all.

Q. How do you know that "Little fink" had done it then? A. I just assumed that.

Q. Now, when you were working on this Grievance Committee in August you took up the matter of the bulletin board, is [130] that correct?

A. Yes, sir.

Q. And one of the things you took up at that meeting was also the matter of Bash's authority, wasn't it?

A. I can't say that the matter of Bash's authority come up at this protest against the board being removed and the bulletins confiscated.

(Testimony of Charles H. Jones.)

Q. But you recall there was some question about Bash's authority, and what he was doing, that he was throwing his weight around a little bit?

A. There was a grievance.

Q. There was a grievance about that?

A. On that line.

Q. That was taken up with Mr. McPherson, wasn't it? A. Yes.

Q. And what did he tell you about Bash's authority to hire and fire?

A. He told us that he would do the hiring and firing.

Q. Now, do you recall any instance in which Bash ever fired anyone up until January 15th of 1949?

A. I was never present when he fired anyone.

Q. Do you know that he ever did fire anyone up to that date? A. I couldn't swear to it.

Q. Do you know of anyone that he suspended up to that date? A. Never run into it. [131]

Q. Now, when you were discussing these grievances in August, did the Company accept you as the representative of the A.C.A.?

A. I am not sure that I was the acting Shop Chairman at that time.

Q. Well, you were one of the members of the committee, though, that met with Mr. McPherson?

A. Yes.

Q. Do you recall that after the meeting you put up a notice or someone put up a notice telling what

(Testimony of Charles H. Jones.)

had happened at the meeting?

A. Usually there was a notice put up.

Q. And that was the regular practice after the grievance meeting, to put a notice up on the bulletin board to tell the employees in the shop what had gone on?

A. Yes.

Q. And do you recall that that notice spelled out the fact that Bash didn't have any authority to hire and fire?

A. I believe that it did.

Trial Examiner Ruckel: Who drew up the notice?

The Witness: The Shop Chairman.

Trial Examiner Ruckel: Well, how could the Shop Chairman say whether Bash had authority to hire or fire?

Q. (By Mr. Ernst): Was that not a report of what had happened at the meeting, that quoted McPherson as having said that?

A. Yes, that McPherson objected to the idea of anyone [132] infringing on his right to do the hiring and firing.

Q. Now, in December, as I recall, you had a meeting or you talked to Bash about the matter of pay of Phyllis—what was her name? One of the girls.

Mr. Brotsky: That was Pauline Smith.

Q. (By Mr. Ernst): Pauline Smith.

A. Yes, December 24th.

Q. And, as I gather, there had been a miscomputation of her pay?

A. No, not a miscomputation.

(Testimony of Charles H. Jones.)

Q. What was the dispute about?

A. It was an attempt to chisel on the party.

Q. Well, I assume that anything the employer does is going to chisel, but just in what way was it going to be done?

A. Holidays, we had 8 paid holidays. If you worked on a holiday, you got time and a half for working in addition to 8 hours' pay for the holiday. If it was your day off and you worked, you were to be given another day off in lieu of your day off or time and a half overtime for working, which amounted to the 6th day, and this day was to be given in the week of the holiday. Mr. Bash knew this and tried to give it the next week.

Q. In other words, he was trying to give her the wrong day off for the holiday that she worked?

A. He was trying to deny her the time and a half for the day that she didn't have off. [133]

Q. So you set him straight as to what the meaning of the contract was, right?

A. I believe I did.

Q. And as a result, he concluded that you had properly stated what the contract was and he made the correction?

A. After some argument and refusal at first, he did. [134]

* * *

Q. (By Mr. Ernst): Now, during the period August 15, 1948, to January 15, 1949, how many grievances would you say were formally presented to the management?

(Testimony of Charles H. Jones.)

A. August 15th to and including January 15th? It would be pretty hard to say. I estimated about six meetings between January 15th and November 6th.

Q. You mean August 15th?

A. August 15th, the expiration of the contract, and November 6th, about six meetings and grievances. Well, there wasn't any meetings. I would say there was probably half a dozen grievances that I know of that were taken up in that time.

Q. You mean from November 6th on until January 15th? A. Yes.

Q. Now, were these grievances just informally presented, such as the one that involved you and this Pauline? A. That would be one.

Q. That would be one of the six? A. Yes.

Q. And was there another one about the alleged demotion of Bruce Risley?

A. One about that.

Q. And was there one about your pay?

A. One about my pay. There was one about Risley being assigned [145] to a watch or bidding a watch that had, for example, the Thursday watch, ending at midnight, and the Friday watch starting at midnight; in other words, 16 hours straight.

Q. Were those presented orally or were they put out in a prepared form in any fashion?

A. Outside of my grievance through the Shop Chairman, they were orally with the complainant and a witness.

(Testimony of Charles A. Jones.)

Q. Now, which one are you referring to, except the one of yours through the Shop Chairman?

A. Mine was on the pay adjustment.

Q. And that was what?

A. I wrote that one up.

Q. And do you recall whether Parks wrote one up regarding the shortened work week during November?

A. He may have, I just don't recall it.

Q. Now, what I want to get into the record is whether you had a regular form such as some unions use in some contracts, in which they spell out on a printed form the nature of the grievance and they send it in to a particular person and it goes through a regular established form of procedure set out in the agreement. Was there anything of that sort in your relations with Globe?

Mr. Brotsky: Just a moment. The contract in question expired August 15, 1948, and I was wondering whether the question was directed to the procedure that terminated on [146] August 15th or the procedure following.

Trial Examiner Ruckel: Well, both?

The Witness: Either before or after I don't recall that we had any regular form. We did not have a printed form.

Q. (By Mr. Ernst): You did not have a printed form? A. No.

Q. Now, in other words, when they were presented in writing, they would be just written down on paper addressed to McPherson or Brown or

(Testimony of Charles H. Jones.)

somebody of that sort and asking for a meeting on it? A. Yes.

Q. Now, up to November the 6th was it the general practice to write out all of the grievances and then have a formal meeting at which the Shop Committee met at a prearranged time?

A. Some matters were settled by shop committees where there was a difference of opinion. Others were taken right in without a Shop Committee meeting, where the contract was clear and the violation was apparent.

Q. What do you mean, taken right in?

A. As soon as we could get an appointment, we would go in without holding any Shop Committee meeting to decide whether it was a just grievance.

Q. By a Shop Committee meeting, you mean the meeting of the union or the ACA? [147]

A. The shop.

Q. The union Shop Committee, not a meeting with management at all?

A. Well, I will start over again.

Q. I am sorry.

A. Sometimes in the case of a person either telling or writing a grievance, it would be necessary to hold a Globe Shop meeting and determine whether this was a just grievance, whether there was grounds for grievance. Others, where it was clear to the Shop Chairman for the Grievance Committee that there was a violation, we would ask by telephone or leave a note and ask for an appointment with management.

(Testimony of Charles H. Jones.)

Q. Now, this Shop Committee meeting was a meeting solely of the employees of Globe in the shop that belonged to the union? A. Yes.

Q. And either without such a meeting or with such a meeting, you would decide that a grievance should be processed, and when you made that decision, then you would ask management for a meeting with respect to it? A. Yes.

Q. Now, were those requests normally in writing or were they usually oral? A. Both.

Q. Both? [148]

A. Sometimes we would notify Bash that we would like to have a meeting, and he would contact Mr. McPherson.

Q. And at the meetings that you had, did Mr. McPherson always attend?

A. Pretty nearly on every occasion McPherson attended the meeting.

Q. And he was the most usual person to attend the meeting? A. Yes.

Q. Now, did you attend the meeting of November 3rd? Do you recall that meeting?

A. November 3rd?

Q. That was the meeting at which there were two people present who did not belong to the Shop Committee.

A. I attended that meeting, if that was on November 3rd.

Q. Did you prepare the minutes of the report of that meeting that was put up on the bulletin board?

(Testimony of Charles H. Jones.)

A. If I could see it, I could tell you. I don't believe I did, but I couldn't say for sure.

Q. Well, now, do you remember a meeting in the middle of October with respect to the short work week with McPherson?

A. In October? If I could see the report of the meeting, I could probably tell. I don't recall.

Q. You don't recall that meeting? You don't recall whether you were there or not?

A. I don't recall offhand. [149]

Q. Now, who acted at that November 3rd meeting? Is it correct that Mr. Brown and Mr. McPherson were at that meeting, representing the company?

A. Among others.

Q. And Mr. Bash? Was he there?

A. I don't believe he was.

Q. And in the meeting of August 30th, that one about the bulletin board and that other stuff, as I recall, McPherson was the only one there. Is that in accordance with your recollection?

A. August 30th about the bulletin board?

Q. Yes, about the bulletin board and about Bash's right to hire and fire?

Mr. Brotsky: Perhaps he would refresh his recollection if he looked at the minutes of that meeting.

Mr. Ernst: Perhaps he would, but I asked his recollection.

A. Well, I was there myself at that meeting.

Q. (By Mr. Ernst): You were there yourself at that meeting?

(Testimony of Charles H. Jones.)

A. I am quite sure I was there. As to who else was there for management, I couldn't say. I believe that Mr. McPherson was present.

Q. Now, do you recall any other very important grievance committee meetings that were handled during this period from [150] August 15th up to November 3rd that you have a definite recollection of having important issues involved?

A. I remember one meeting, that wasn't pre-arranged, wherein we notified, asked, Mr. McPherson to talk with Mr. Brown. We were unable to talk with him and we had asked him to pass the word around to Mr. Brown, that inasmuch as the ACA still represented the majority of the people in the office, that we would like to represent the majority on the contract.

Q. That was taken up with Mr. McPherson?

A. Yes.

Q. And he promised to take it up with Mr. Brown?

A. Yes.

Q. And McPherson was the only one that you talked to on that particular occasion?

A. Yes. [151]

* * *

Q. Were you pestered by these people who weren't active ACA during the week that you were on this new shift?

* * *

A. I was not pestered, I was just given a cold shoulder and shown no cooperation nor courtesy that a co-worker would expect.

(Testimony of Charles H. Jones.)

Q. (By Mr. Ernst): In other words, these other people who [156] were working in the room, except for Lillie Friend and Niemi, were making it unpleasant? A. Yes.

Q. An unpleasant place to work? A. Yes.

Q. Did you resent that yourself?

A. I couldn't help but feel it.

* * *

Q. (By Mr. Ernst): Did you feel that the other employees were hostile to you with respect to your work? A. Hostile, did you say? [157]

Q. Yes.

Mr. Brotsky: Objection on the ground of immaterial, vague.

Trial Examiner Ruckel: He may answer.

A. I felt a certain amount of hostility existed.

Q. (By Mr. Ernst): Do you think that it affected your temper at all at that time?

Mr. Berke: I object, this is immaterial, and irrelevant. I think we are taking an awful lot of time to get to what counsel is driving at.

Trial Examiner Ruckel: He may answer.

A. Well, I generally get along well with [158] people.

* * *

Mr. Ernst: Well, I think that the statements of Mr. Jones as to what happened between himself and Mr. Bash can be explained to a great degree by the

(Testimony of Charles A. Jones.)

fact that Mr. Jones felt that he was being pushed around by these other people, and that he therefore did not have the patience that he would normally have, and as a result he got into these arguments with Mr. Bash, [159] and that this situation, or the background of the relation made these things flare up in this fashion. And I want to try to find out what were the things that contributed to the hot words, because the witness has clearly testified to rather hot words that he used to Mr. Bash.

Mr. Berke: I submit, Mr. Trial Examiner——

Trial Examiner Ruckel: It seems to me it is remote.

Mr. Berke: Yes.

Trial Examiner Ruckel: I don't follow the argument. Objection sustained to this line of testimony. [160]

* * *

Q. (By Mr. Ernst): Now, referring to January 19th, as I understand your testimony on direct examination, you stated that some time between your return to the Shanghai circuit after relieving the people at lunch, and the time that you were to go to lunch at 12:00 o'clock, Bash came back to you with this group of telegrams, or radiograms, and talked to you about the proper form to be used, is that correct? A. That is correct.

Q. And you got into some argument with him about this matter, correct?

A. There was no argument about the forms.

Q. Did you try to tell him that it was the right form to use?

(Testimony of Charles A. Jones.)

A. I told him, I says, "I have been using this form for years on international circuits. If Globe wants me to use a different form I can do that."

Q. In other words, it was a very peaceful arrangement, there was not any—— [161]

A. It was on my part.

Q. How about Bash?

A. Bash couldn't hardly speak to a person civilly.

Q. That was the case of everybody in the place?

A. That is true.

Q. And it was a general practice all around?

A. It is his way.

Q. I mean he just was the type of guy——

A. That roared.

Q. A bull in a china shop? A. He roared.

Q. He roared and hollered and was not very tactful? A. (No response.)

Q. And I would assume that you got so that you didn't pay attention to that?

Mr. Brotsky: Just a minute. Object to it on the ground it is irrelevant and immaterial.

Trial Examiner Ruckel: Objection sustained.

* * *

Q. (By Mr. Ernst): Did you raise your voice at all when you talked to Mr. Bash at that time?

Mr. Brotsky: Is that January 19th, counsel?

Mr. Ernst: I am now talking about the time Mr. Jones referred to, either as an out and out assertion

(Testimony of Charles A. Jones.)

that she had turned him in, or as a thought that she had turned him in.

Trial Examiner Ruckel: Did you raise your voice?

The Witness: I don't recall that I raised my voice until he started roaring.

Q. (By Mr. Ernst): But the first sentence you did say something about that "fink," didn't you?

A. Yes.

Q. And you throw that out as ordinary conversation around the place?

A. I did not say it in a loud enough tone that anyone in the back room could hear it.

Q. I mean, was that the ordinary way you referred to your [164] fellow workers?

Mr. Berke: Just a moment. I object to that as incompetent, irrelevant and immaterial, and argumentative.

Trial Examiner Ruckel: Objection [165] sustained.

* * *

Q. (By Mr. Ernst): Now, is it your recollection that this conversation with Bash that we have just been referring to, in which this word "fink" was used by you in a low tone of voice, and eventually Bash got shouting, occurred on the afternoon of January 20th, the day, or the last day you worked in the place? A. That is my recollection.

Q. And that it occurred while you were sitting at your machine operating it? A. Yes, sir.

Q. And while Bash was walking around the room?

(Testimony of Charles A. Jones.)

A. He come over to my position, yes.

Q. And while he was coming around the room you asked him to come and check and see if the form you were using was all right then?

A. I went back to his desk on that occasion. [167]

* * *

Q. Around after 2:00 o'clock. What did you do, go up to Bash's office, or Bash's desk, not "office"?

A. I went back to his desk.

Q. He doesn't have an office, he just has a desk in the room? A. Yes.

Q. You went back to his desk and checked to see if it was all right? [168]

A. Asked to look at it.

Q. At that time did you discuss anything with him other than that particular thing?

A. I simply said to him that "I expect that you will—the way things are in the office that you will probably pick my work to pieces, find fault with my work at every chance, and I am not going to go for it."

Trial Examiner Ruckel: Did he answer that?

The Witness: I don't remember that he answered it, I don't remember that he denied it.

Q. (By Mr. Ernst): As far as you recall, he ignored it then? A. That is right.

Q. He didn't even go off into one of his loud outbursts at that time? A. I don't believe he did.

Q. Now, was this before or after you talked to him on this "fink" conversation?

(Testimony of Charles A. Jones.)

A. That was before.

Q. Before that? A. Yes.

Q. It was on the same day or a different day?

A. That was the same day.

Q. Now, you went to lunch at 4:30?

A. I went to lunch at 4:00.

Q. At 4:00. And did you speak to Bash on your way back from [169] lunch?

A. I saw him during my lunch period.

Q. You saw him during your lunch period?

A. Yes, sir.

Q. Where did you see him?

A. In the rest room.

Q. Now, did he ask you to wait around in the room for a few minutes when he first talked to you?

A. He wanted to wait until the women got out of there, a couple of women that were going home.

Q. What were those, were they ACA women?

A. I don't know. They were not—they were from the inside office, I believe.

Q. And then he broached this to you after these other people had gone away?

A. After they cleared out.

Q. Did he start out in a loud voice or not on this occasion?

A. As I recall he didn't, he didn't roar to start out with.

Q. And did he mention anything about a statement from McDowell? A. Not to me.

Q. Or one of the Supervisors?

A. Not to me, no.

(Testimony of Charles A. Jones.)

Q. Did he limit what he had to say almost entirely to the matter of the amount of punching you got out?

A. In answer to my question, yes, whether it was—he said [170] my work was not satisfactory. I asked him if it was quality or quantity. [171]

* * *

Q. Now, why did you say to Bash that you wanted to know whether it was quantity or quality?

A. He said my work was not satisfactory, and I wanted to know in which way it was not satisfactory.

Q. In other words, you were still discussing it in a very calm way, I mean there was not any excitement at that stage of the game at all?

A. Not on my part, there was not.

Q. Was Bash still——

A. Bash was fairly quiet. [172]

* * *

Q. (By Mr. Ernst): Now, Mr. Jones, you then refused to practice on company time?

A. Yes, I told him it was an insult, that I couldn't do it. [176]

* * *

Trial Examiner Ruckel: The Complaint doesn't charge the Company with seeking to discourage union activities by speeding up. I don't know what the terms are they use, but it is the ordinary synonym as "go faster." [190]

* * *

(Testimony of Charles A. Jones.)

Q. And were Mr. Parks and Mr. Hinde given instructions as to what they were to do?

A. They were.

Q. And what were those instructions?

A. That they were to request from the subordinate person in charge, to have a meeting to protest the firing; that is, with the upper brackets. [192]

Q. In other words, they were to ask the supervisor in charge at 12:15 to get for them a meeting with somebody higher up, is that it?

A. Yes, whoever done the firing.

Q. And did you know at that time who had done the firing?

A. I had been fired by Mr. McPherson. [193]

* * *

Q. Now, did you pay attention to what Bash said in the course of that conversation with you and Parks and with the group of people around?

A. Not too much, I was not doing any talking, and there was a lot of chatter, protests, confusion, wrangling.

Q. So you don't have much of any recollection what Bash said then?

A. Oh, I heard him order them back to the circuit, I heard him say, "You are all fired," screaming and roaring, both. [194]

Q. That is all that you recall that he said?

A. Approximately all that I recall.

Q. Did you recall him saying anything to the effect that he was not the one that fired you, and they should take the matter up with the person that did fire you?

(Testimony of Charles A. Jones.)

A. I believe in the course of the various conversations he mentioned that.

Q. Now, were you ever told by Neil Brown, or by any notice from Neil Brown that you could come in and talk to him any time you wanted to about your troubles?

A. I was told orally as I sat on the circuit working one day, before November 6th. [195]

* * *

Q. Now, when you went over to see McPherson with the group on the late afternoon of the 21st, did you have any trouble getting into his office?

A. I didn't have any trouble because I hardly got into his office, I was very much in the background.

Q. Did the other people have difficulty getting in to see him?

A. When they finally decided to meet with him, they simply walked in the door.

Q. And who finally decided to meet with him?

A. McPherson.

Q. In other words, then you got the meeting you wanted when you were talking to Bash?

A. Some hour later, I would estimate about an hour later, after 4:15.

Q. And so you would say roughly at 5:15 they agreed to have the meeting with Mr. McPherson?

A. That is right.

Q. The company agreed that McPherson would talk to you? [198]

A. Roughly at 5:15.

* * *

(Testimony of Charles A. Jones.)

Q. (By Mr. Ernst): Then at the time of the discussion with Bash, in the interim between 4:15 and 5:15, when the group went [199] to see McPherson, was there a steady discussion between the group and Leo Bash, or did everybody just sit around and say nothing?

The Witness: Part of the time I believe Bash was working the circuit, or doing clerical work.

Q. But the rest of the time there was conversation with Bash about this matter? A. Yes.

Trial Examiner Ruckel: Did Bash ordinarily work the circuit and do clerical work?

The Witness: He spent quite a bit of time doing clerical work, and some time on teletypes, but didn't work the radio circuits.

Trial Examiner Ruckel: Was he working the regular circuits during this hour, if you know?

The Witness: I believe that he worked on the radio circuits.

Trial Examiner Ruckel: I say why was he at this time?

The Witness: Well, there was nothing else for him to do, he had worn himself out screaming and roaring. [200]

* * *

Q. (By Mr. Ernst): And the several people who would normally have been doing that work were among the group who were sitting down at that time?

A. The people that were on at four o'clock were not on the circuits.

(Testimony of Charles H. Jones.)

Q. No, and it was those people who were to come on at four o'clock, and who were not on the circuit, were then sitting in, not doing their work, is that right?

A. Waiting for a representative of the company to discuss this firing with.

* * *

Q. (By Mr. Ernst): As I recall, one of the last things that Bash did at the time you and this group were in there on the afternoon between 4:15 and 5:15 was to ask each one of the individual persons to go back to his circuit and return to work, is that correct?

A. Yes.

Q. And then, as I recall it, they said that they would not [201] go back to work, is that right?

A. They didn't say they wouldn't go back, they said they would go back to work when they could protest the firing.

Q. In other words, they were going to go back to work when they could protest?

A. Yes.

Q. In other words, they didn't feel they had made their protest at that time?

A. Not with the proper party, no.

Q. And they therefore wanted to make the protest with someone else, is that correct?

A. With the person who was responsible for the firing.

Q. And did anybody tell them they couldn't make their protest to whoever was responsible?

A. I don't remember the words that they used

(Testimony of Charles H. Jones.)

but there was certainly a considerable delay in not being able to meet with someone.

Q. And in the past had you individually frequently asked McPherson to have meetings with you?

A. In various ways sometimes contacted him. Generally contacted Bash to request the meeting.

Q. You generally contacted Bash to request the meeting? A. Yes.

Q. But you yourself had on occasion gone directly to McPherson and asked for a meeting? [202]

A. If I didn't, the others did, I don't recall who.

Q. On this day nobody went to McPherson and asked him directly for a meeting?

A. That wasn't the procedure.

Q. What was the procedure?

A. The regular procedure was——

Q. No, what was the procedure that day?

Mr. Berke: We will object to that.

Trial Examiner Ruckel: Tell us the procedure that day and tell us whether or not that was the customary procedure.

The Witness: The regular procedure was to work through Bash, was the regular procedure.

Q. (By Mr. Ernst): And was it regular procedure to refuse to work from the time you asked Bash for a meeting until you got one?

Mr. Berke: I object to that.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): The regular procedure was

(Testimony of Charles H. Jones.)

to ask Mr. Bash for a meeting with Mr. McPherson?

A. That was the usual procedure.

Q. And you could, however, go directly to McPherson, if you wanted to, and you or other members of the Shop Committee did that from time to time?

A. It had been done.

Q. And did you frequently have delays between the times [203] you asked Bash for a meeting and the time you got the meeting with McPherson?

A. I answered that once before, by saying that sometimes it wasn't convenient for him to meet with us that morning or the next morning and we understood.

Q. And on those occasions you would then continue your work until the time for the meeting arrived?

A. Under ordinary conditions that was the procedure.

Q. Now, on any occasion were you told by Bash that you could not meet with McPherson?

Mr. Brotsky: Are you referring also to the events of January 21st, when you say any occasion? I will object unless that point is made clear.

Trial Examiner Ruckel: Well, is the point worth any more time? It is quite clear what the usual procedure was and what the procedure was in this case. Objection sustained.

Q. (By Mr. Ernst): Now, do you recall that the Shop Committee wrote a letter to Mr. Brown on one occasion, asking whether he agreed with McPherson's position interpreting Brown's notice of No-

(Testimony of Charles H. Jones.)

vember 6th to the effect that McPherson wasn't going to meet with the ACA Shop Committee as such any more?

A. I believe such a letter was written.

Q. And did you have any difficulty in getting that letter into Mr. Brown? [204]

Mr. Berke: I object. I don't see the relevancy of this line of questioning.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): What time was your afternoon meeting on January 21st?

A. 1:30, I believe.

Q. And how long did that meeting last?

A. I would have to estimate that. Probably an hour and a half.

Q. In other words, to around three o'clock?

A. To give them time to eat.

Q. And at that meeting were virtually all the people present who were going to go on at four o'clock and who were regular members of the ACA, Globe?

A. Practically all of them.

Q. At that time was a decision made as to the time at which this protest would be made?

A. It was set.

Q. And just what form did you decide the protest was to take?

A. I answered that yesterday, that Parks would formally protest the firing.

Q. Now, is this the first time that your group had ever made a formal protest as to any action of the company?

(Testimony of Charles H. Jones.)

A. You mean violations of the contract on grievances? [205]

Q. Is this the first time you ever had made a formal protest? You said that you were going to make a formal protest. Was this an unusual thing or had you done that on other occasions?

A. We had met, or we had gone into the inside office where we could see Mr. Brown or Mr. McPherson to inform him that we wanted the company to negotiate a new contract with ACA.

Trial Examiner Ruckel: Was that the whole group or the Grievance Committee?

The Witness: This was the people leaving at four and going to work at four.

Q. (By Mr. Ernst): The whole group went in to see Mr. Brown about that matter?

A. Yes, tried to see Mr. Brown.

Q. They didn't see him?

A. On the occasion when I was the spokesman, we couldn't see Mr. Brown.

Q. Who did you see?

A. We saw Mr. McPherson and he promised to convey the information to Mr. Brown.

Q. And at the 1:30 meeting did you discuss whether you would go to see Mr. McPherson or Mr. Bash?

A. I believe it was decided to see Mr. Bash, to see the party that did the firing.

Q. Now, when the group came around you and Parks, after you [206] came into the operating room, did they come with the two of you as soon as you

(Testimony of Charles H. Jones.)

arrived in the room or after the conversation had begun?

A. I believe after the conversation began.

Q. In other words, they overheard the conversation and then became interested and came over?

A. I don't know that they overheard it. They came over.

Q. And was it part of the plan that the formal protest was to include all of the people coming together to see Mr. Bash?

A. To protest, yes.

Q. And was it the plan that all of them were to refuse to work?

A. No, that they would protest to the firing party and when the protest was heard, return to their positions.

Q. That was the program that was worked out?

A. Yes.

Q. And by the matter of hearing the protest, what did you mean?

A. By talking to the party that had done the firing and had the power to reinstate.

Q. And all that the group wanted to do then was to talk to that person?

A. Yes.

Q. Now, when they had gone through the meeting with Mr. McPherson, they had talked then to the person that they were [207] interested in talking to, is that right?

A. I assume that he was the right person. He had fired me.

Q. And then, therefore, when they were through talking with Mr. McPherson, they had accomplished

(Testimony of Charles H. Jones.)

everything that they had wanted to accomplish by this protest?

A. They had not accomplished the reinstatement.

* * *

Q. And as I understand it, at the end of the conversation or shortly before the end of the conversation with Mr. McPherson, it was clear that they were not going to reinstate you, is that correct?

A. He made that clear.

Q. And he also made it clear that the other people could go back to work, didn't he?

A. I believe that he did offer them the opportunity to go [208] back to work.

Q. And then they did not go back to work?

A. No, they were fired.

Trial Examiner Ruckel: What was your answer?

The Witness: No, they were fired.

Q. (By Mr. Ernst): But they said they wouldn't go back to work in between the offer and the time that they were fired? A. Yes.

Q. Now, during the course of these two meetings with Mr. Bash and Mr. McPherson, did anybody on any occasion say that he would not work until you were put back to work?

A. I believe that was said by some of them.

Q. By some of the people?

A. Some of the people.

Q. Was that the general attitude of everybody so far as you could tell? A. I would say so.

* * *

(Testimony of Charles H. Jones.)

Redirect Examination

By Mr. Berke:

Q. Mr. Jones, on the occasion when you and Parks approached Mr. Bash and Mr. Parks asked that you be reinstated, what did Mr. Bash say?

A. That he had not done the firing, that he had suspended me and that he could not reinstate [209] me.

Q. And was it following that statement, that Mr. Parks and the others who had gathered around demanded to see whoever had done the firing?

A. Yes. [210]

* * *

Q. In the past when you had requested to see someone higher up through Bash what was the usual procedure if you cannot see the person immediately?

* * *

Q. (By Mr. Brotsky): On those occasions was there an answer usually given, however, as to whether or not you could see the person then or at some other time?

A. Generally, as I recall, we would ask for a meeting for the following day, because we that happened to work the midwatch, off at 8:00 o'clock, did not want to wait from 8:00 to 9:00 or 10:00 o'clock and then not be able to see Mr. McPherson or Mr. Brown. [216]

* * *

(Testimony of Charles H. Jones.)

Recross-Examination

* * *

By Mr. Ernst:

Q. In other words, you don't recall much of anything as to what Mr. Bash answered when you asked him for the meeting with McPherson?

A. Mr. Parks asked him, was the one that lodged the protest, and asked him.

Q. Your recollection as to what he said is very vague at this time?

A. Pretty much in the background.

* * *

RUDOLPH W. NIEMI

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berke:

Q. Mr. Niemi, were you ever employed by Globe Wireless, Ltd.? A. Yes, I was.

The Reporter: May I have his name, please?

Q. (By Mr. Berke): Will you give the reporter your name and [220] address, please?

A. Yes. Rudolph W. Niemi, N-i-e-m-i, 147 Arch Street, San Francisco.

Q. And you say you were employed by Globe Wireless, Ltd.? A. Yes, I was.

Q. When were you first employed by that Company? A. April of 1948.

(Testimony of Rudolph W. Niemi.)

Q. And when were you last employed there?

A. January 21, 1949.

Q. What position did you hold on January 21?

A. I was a teletype operator.

Q. And what watch did you work on?

A. Noon to 8:00 p.m.

Q. Were you a member of any Union at the time you first obtained employment at Globe?

A. I was a member of the ACA, Local 9.

Q. And did you continue to be a member of that Union while you worked at Globe?

A. Yes, I was a member of the Union all the time I worked at Globe. [221]

* * *

Q. (By Mr. Berke): All right, then, when you heard that, what else did you hear?

A. Mr. Bash asked Charlie to go into the front office and Charles returned and said, "I would like to have your representative go in with me," and Mr. Jones asked me to go, and Mr. Bash turned around and he told me to sit down, that I wouldn't be needed in there, and Charles reiterated that he wanted a representative and that he would like to have me.

Mr. Bash left the operating room, came back shortly, and [226] said it was all right for me to go in with him.

Q. Did you then go in with Mr. Jones?

A. Yes.

Q. And where did you go?

(Testimony of Rudolph W. Niemi.)

A. We went to Mr. McPherson's office.

Q. Who was present in Mr. McPherson's office besides Mr. Jones, yourself and McPherson?

A. Mr. Bash was present.

Q. What took place in there?

A. I asked Mr. McPherson if it was all right for me to act as Charles Jones' representative, and Mr. McPherson said yes.

Q. And can you tell us what took place, what was said, what was done?

A. As near as I can recollect, the following conversation took place, Mr. McPherson told Charles that his work was not satisfactory. No, that wasn't it. He told Mr. Jones that Mr. Bash reported that his work was not satisfactory, and Mr. Jones asked Mr. McPherson, "Qualitatively or quantitatively"? and Mr. McPherson returned, "Quantitatively." And he asked Charles if he was going back on the circuit to practice or if he had refused to practice, and Mr. Jones returned yes, that he had refused to practice. And about that time I think—I shouldn't say I think, I put in some words myself.

Q. What did you say?

A. I told Mr. McPherson that Charles Jones was a very good [227] operator and "He doesn't need any practice." I said, "It is an insult to the man to say that he needs practice."

Q. Did you say anything more?

A. Then I said, "You are firing the wrong man. Mr. Bash sitting here should be fired instead of Mr.

(Testimony of Rudolph W. Niemi.)

Jones, because he is the cause of all that trouble in the operating room."

Q. What did Mr. McPherson say about it?

A. Mr. McPherson didn't say anything other than, "Well, Mr. Jones, I am afraid you are discharged." [228]

* * *

Q. Was there anything more that transpired in that office?

A. Yes. Just as we were rising to get up, I told Mr. Bash and Mr. McPherson, "I suppose I will be next to get fired, because of this."

Q. Was anything said about that?

A. Not a word.

Q. Was that all that took place then?

A. Then we proceeded out. On our way out, Mr. McPherson told Charles that his check would be mailed to him. [229]

* * *

The Witness: Yes, I will quote as closely as I can. Mr. Bash told Mr. Boatwright that we would have to get tough with these people and he said, "They are Communist-dominated." And I didn't see Mr. Boatwright say anything back to him except nodding his head.

* * *

Q. What time did you go to lunch on that day?

A. I went out to lunch at 4:00 p.m.

Q. And about what time did you come back from lunch? A. 4:20.

(Testimony of Rudolph W. Niemi.)

Q. Did anything unusual happen after you came back from lunch?

A. Well, I would say the usual thing was happening, and that was Leo hollering at somebody and he was hollering at Bruce Risley to get back on the circuit. [230]

Q. Where was Mr. Risley?

A. He was over by the Supervisor's desk and there were a number of people standing by.

Q. Do you know who these people were that were standing by, as you say?

A. They were people—I can think of the names of them, yes, pretty closely.

Q. Will you name them?

A. Mr. Parks was there and Charles, Charles Jones, and Pauline Smith and, let's see, there is a girl named Williams, her last name. Well, anyway——

Q. Sylvia Pottle, was she there?

A. She wasn't at that time. She came later.

Q. Do you remember any other names?

A. Well, whoever was supposed to be from 4:00 to midnight. That is about all the names I can recollect right now.

Q. All right, what was the group doing?

A. They were protesting the firing of Charles Jones.

Mr. Ernst: I ask that the conclusion be stricken, that he state what he heard.

Trial Examiner Ruckel: It may stand. Tell us

(Testimony of Rudolph W. Niemi.)

also what you heard any of them say that made you believe that they were protesting.

The Witness: I can't remember which woman I heard say it, but I heard her say, "Please reinstate Charlie Jones so that we [231] can all get back to work."

Q. (By Mr. Berke): What else did you hear?

A. Oh, Leo Bash wasn't saying much, but he was fuming around the office there. At that particular moment there weren't many words going on right then at that moment, when I came back, except Leo was telling Bruce to get back to the circuit.

Q. Did you say anything?

A. If I did, I can't remember it right now.

Q. Did you join the group?

A. Yes, oh, I joined the group.

Q. What was your purpose in joining the group?

A. My purpose in joining the group was to join in the protest for the unjust firing of Charlie Jones.

Q. How long did the group remain around Mr. Bash's desk?

A. I would estimate closely around an hour.

Q. And what happened at the end of that hour?

A. Well, before that hour, in the interim there, Mr. Bash had told us we were all fired, and he went over and got our cards and timed us out.

Q. Where did he get those cards?

A. They have a file there by the time clock, where all our cards are put in.

Q. What did he do with that?

(Testimony of Rudolph W. Niemi.)

A. He timed us all out.

Trial Examiner Ruckel: He punched [232] the clock?

The Witness: He punched the cards himself.

Trial Examiner Ruckel: On each card?

The Witness: Yes.

Trial Examiner Ruckel: What did he do with the cards then?

The Witness: He took them out of the file and where he put them I didn't notice.

Q. (By Mr. Berke): What happened after that event?

A. Well, after he did that, I didn't hear much more conversation but I heard Mr. Parks conferring with Leo and we tried to get an audience with someone on the inside.

Q. Did you get that audience?

A. I shouldn't say we got the audience, no, for the reinstatement of Charles.

Q. What happened?

A. Mr. McPherson had us come into the office, but we didn't go into his office, just into a little ante-room, something like that, by a gate.

Q. Did the entire group, including yourself, go into that ante-room?

A. Yes, we all went in there.

Q. And did you hear what was said?

A. Yes, I heard quite plainly what was said.

Q. What did you hear, and will you tell us who said it, if you recall? [233]

(Testimony of Rudolph W. Niemi.)

A. Sylvia Pottle was talking to Mr. McPherson but Mr. McPherson didn't say a word back at all. He kept very quiet and Sylvia told him that he should be firing Leo Bash instead of Charlie Jones, that it was very unfair and unjust and that we had all liked our jobs at Globe Wireless and we wished to continue working and there was no reason for the trouble and that Mr. Bash was the cause of all the trouble.

Q. Did Mr. McPherson tell you to go back to your work or did he say if you wanted to, you could go back to work?

A. At no time did Mr. McPherson personally say that we could go back to work.

Q. What did he say about your firing, if anything?

A. The only thing he told us was that our paychecks would be mailed and a little slip would come with it, notice of our discharge.

Q. Did you subsequently get your check in the mail?

A. Yes.

Q. That Mr. McPherson referred to?

A. Yes, we did.

Q. And did you get that slip?

A. Yes, I got a slip also.

Q. I show you a document marked General Counsel's Exhibit 10 for identification and ask you if that is the slip you refer to?

A. Yes, that is the one. [234]

Mr. Berke: I offer General Counsel's Exhibit 10 in evidence.

(Testimony of Rudolph W. Niemi.)

Mr. Ernst: No objection.

Trial Examiner Ruckel: It will be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification, and was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 10

In View of the Termination of Your Employment, We Hand You Your Final Pay Check Covering Salary Through January 22, 1949. This Check Also Includes Any Accrued Vacation Pay.

Received July 27, 1949.

Q. (By Mr. Berke): Were you ever called to work after that?

A. You mean at Globe Wireless?

Q. Yes. A. No, I was not.

Q. Did you serve on the picket line?

A. Yes, I served on the picket line up until I became ill. It was pretty cold weather. [235]

* * *

Trial Examiner Ruckel: What time did you go to lunch, by the way?

The Witness: My lunch was from four to four-thirty.

Q. (By Mr. Brotsky): Did you see Mr. Parks and Mr. Jones talking to Mr. Bash?

A. At what time?

(Testimony of Rudolph W. Niemi.)

Q. When you returned from lunch, you saw Mr. Parks conferring with Leo? A. Yes.

Q. You stated that you joined the group?

A. Yes.

Q. Did you want to see Chuck Jones reinstated?

A. That was my object in joining the group. I wanted to see him reinstated. [239]

* * *

Cross-Examination

By Mr. Ernst:

Trial Examiner Ruckel: Well, I think we can simplify it possibly by saying this: The only question is was Jones discharged because of his union activity, or for legitimate business reasons, in this case, as the Answer alleges, for insubordination and refusal to practice on a machine. Now, whether or not his refusal to practice on the machine was motivated merely because he was lazy, or because he didn't think he needed practice, or because of some resolution of the Union at some previous time, it doesn't seem to me as too relevant. The question is one of fact, what motivated the Company in discharging Mr. Jones, not what motivated Jones.

I am going to sustain the objection to the entire line of testimony as to this previous meeting which you have asked the witness about.

Mr. Brotsky: Can that go out then, Mr. Examiner?

Trial Examiner Ruckel: Yes, it may go out, the testimony of this witness as to a previous meeting

(Testimony of Rudolph W. Niemi.)

of the Union. He testified that he was¹ not present at the meeting. [263]

* * *

Q. Now, at the time that you got back from your lunch period, were Parks and Bash the only ones that were talking? You said Parks was conferring with Leo?

A. Yes, Parks was conferring with Leo when I got back. The very moment I got back, they weren't, no, because Leo was [266] hollering his lungs out at Bruce Risley.

Q. And where was Bruce Risley?

A. He was standing right back there with the group and Leo was telling Risley to get back on the circuit or he would be fired.

Q. Did he tell anybody else to get back on the circuit?

A. Yes. Later he told all of us to get back.

Q. And was that about the last thing that he did tell everybody, to go back on the circuit?

A. Yes.

Q. And then, as I recall, he told you that you were fired, when you didn't go back on the circuits?

A. Yes. He told all of us we were fired, Leo himself.

Q. And that was the end of your conversation with Bash?

A. Well, at that particular time he kept coming back and forth from the operating section where they were actually doing the work to us, back and

(Testimony of Rudolph W. Niemi.)

forth, and he was like a bull in a china closet, just going back and forth. 1

Q. Well, what I am asking you is: Was the last thing he said to you was to go back to work and the people said they wouldn't and then he said, "You are fired," is that correct?

A. No. It didn't go that way.

Q. What was it?

A. He kept telling various ones of us to get back on the circuit. He said, "Get back on the circuit and go to work." [267]

Q. What did they say in reply to that?

A. Most of us just kept quiet. He came around later and we told him that we would go back to work when Charlie Jones was reinstated. [268]

* * *

Q. Now, earlier, as I understand it, you came in and Bash was shouting at Bruce Risley to get back at the circuit and after he let his voice drop down, there was this conferring between Parks and Bash. At that time, as I understand you, you said that Parks was asking to get an audience, is that correct? A. That is the essential thing.

Q. Do you recall what Parks said at that time?

A. I don't recall the exact words, no. He tried to get an [273] audience with whoever he could to get Mr. Jones reinstated.

Q. He said you wanted an audience with whoever could reinstate Mr. Jones? A. Yes.

Q. Was General Boatwright's name mentioned?

(Testimony of Rudolph W. Niemi.)

A. I heard Leo holler, "Why don't you go in and see the General," just like that.

* * *

Q. Now, you said you remembered one of the women saying, "Please reinstate Charlie Jones so that we could get back to work." Do you recall any reply to that?

A. No, he didn't reply to those queries. Leo didn't reply to any of us, when we said that we wanted him to reinstate Charlie. He just kept along the same vein, telling us to get [274] back on our circuits, I mean prior to that, but then he said we were all fired and timed us out. [275]

* * *

Q. By the time you returned usually from lunch, had the people who were off at the 4:00 o'clock hour, gone from the place?

Mr. Ernst: I object as immaterial and cumulative.

Trial Examiner Ruckel: He may answer.

A. Yes, they were gone. There was no reason for their being there. The shift was over.

* * *

Recross-Examination

* * *

By Mr. Ernst:

That may be a matter of argument but the simple fact that I think should be established is that these

(Testimony of Rudolph W. Niemi.)

people were taking the place of the people who were refusing to work and that Bash was trying to get the people who were regularly assigned, to go back to work.

Trial Examiner Ruckel: That is a matter of argument. Isn't that apparent from the record? What do you want to do, wring an admission from the witness? He testified that the people were standing around. They weren't on their circuits at 4:20 or 4:30. Counsel shows that there were four or five other people, one of them supervisors, that didn't ordinarily do this, and one or two others. They were manning the circuits. Now should we sit down here and argue as to who should have been the people on the circuits at that moment? It is rather clear, isn't it?

Are there any further questions? [280]

* * *

Trial Examiner Ruckel: The witness has said several times both on direct and cross how they were being handled and even naming them as to who they were. The only thing I stopped you with was on your argumentative question that was going to show that they were not the ordinary people that were handling the circuits, and I stated that that was self-evident. Now, if you are going to litigate what the Examiner says is [284] self-evident, you are painting the lily, aren't you?

Anything else? [285]

* * *

SYLVIA POTTLE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: Your name, please?

The Witness: Sylvia, S-y-l-v-i-a, Pottle, P-o-t-t-l-e.

By Mr. Berke:

Q. What is your address, Miss Pottle?

A. 2419 Durant Avenue, Berkeley, California.

Q. Were you ever employed by Globe Wireless?

A. Yes, I was.

Q. When were you first employed there?

A. September, approximately September 17, 1946.

Q. And when were you last employed at that place? A. January 21, 1949.

Q. When you first obtained employment at Globe were you a member of any union?

A. No, I was not.

Q. Did you join any union after you obtained employment at Globe? A. Yes, I did. [286]

Q. Which union?

A. ACA, CIO, Local 9. [287]

* * *

Q. (By Mr. Berke): Do you recall January 20, 1949?

(Testimony of Sylvia Pottle.)

A. I was off on that day. It was my regular day off.

Q. Did it come to your attention that day or thereafter, that Chuck Jones had been discharged?

A. I didn't know about Chuck Jones' discharge until I came to work on January 21st, at approximately 4:15.

Q. In the afternoon? [296]

A. When I first heard of Chuck Jones' discharge.

Q. When you got to work on January 21st at 4:15 in the afternoon, what did you find?

A. Pardon me, I came to work at four o'clock. At 4:15 was when I first heard of Chuck Jones' discharge.

Q. All right. What happened at 4:15 that brought it to your attention?

A. Bruce Risley came over to me and informed me that Chuck Jones was fired.

Q. Who was Bruce Risley?

A. Bruce Risley was the teletype operator for Globe Wireless.

Q. What did you do when you learned about that?

A. Do you want to know the words that I used, the exact words?

Q. I want to know what you did, what you said.

A. Well, I said, "Well, that is ridiculous. What is the reason?"

And he said, "Well, the company's reason is incompetent and non-production."

(Testimony of Sylvia Pottle.)

And I said, "That is ridiculous." [297]

* * *

Q. (By Mr. Berke): What did you do after you got that information?

A. Bruce told me that they were asking for a, they requested a meeting with Mr. McPherson in regard to it, and did I want to join them, and I did.

Q. And did you want to join whom?

A. The party, the group that was over at the desk, Mr. Bash's desk.

Q. And did you join them? A. I did.

Q. Who in addition to yourself and Mr. Risley were in that group?

A. As I recall, there was Pauline Smith, Chuck Jones, Parks, Hinde, Viola Williams, a fellow by the name of Ted Byer, Rudy Niemi.

Q. Is that about all that you——

A. That is about all I can think of off hand.

Q. All right. Now, you say that you came to work at four o'clock. What did you do between four and four-fifteen when you were informed of Mr. Jones' discharge? [298]

A. I went to my department and started working.

Q. Started working? A. Yes, uh-huh.

Q. At your desk?

A. Well, we really don't have a desk, we just run around from one department to another.

Q. But you were actually on the job?

A. I was on the job.

Q. Were you able to hear what went on in this group that you have just described?

(Testimony of Sylvia Pottle.)

A. The only voice I heard was Leo Bash's.

Q. What did you hear Mr. Bash say?

A. I heard him say, "Get back to your position."

Q. Did the people go back to their position?

A. No.

Q. Did you see him do anything? A. No.

Q. How long did you remain with the group?

A. When I joined them it was—I remained with them until we were informed we were fired.

Q. And who informed you that you were fired?

A. Leo Bash.

Q. About when was that?

A. Approximately an hour after I—about 5:15, I should say, thereabouts. [299]

Q. Did you see Mr. McPherson that day?

A. I did.

Q. Did you see Mr. McPherson before or after Bash told you you were fired?

A. After Bash told us we were fired.

Q. Was anyone else with you when you saw Mr. McPherson?

A. We were altogether in a group.

Q. That is all the people that you have mentioned? A. All the people I mentioned.

Q. And in what room were you together?

A. In the administrative room, in the front office.

Q. Is that a room that leads into, is connected with Mr. McPherson's office?

A. It is the anteroom of the main offices.

Q. What happened in that room?

A. We walked right into the anteroom, and Mr.

(Testimony of Sylvia Pottle.)

McPherson walked out, came right to the gate, where there is a gate that leads into the inner office from the anteroom, he came to the gate, and we were all standing around, and I heard Al Hinde say to him, "Leo just fired us."

Q. What did Mr. McPherson say?

A. "That is right."

Q. Did you participate in any of the discussion?

A. I did.

Q. What did you say, and to whom did you say it? [300]

A. I spoke to Mr. McPherson personally, I asked him if I could say a few words.

Q. What did he say?

A. He said, "Go ahead." Well, I told him that we all liked our jobs very well, I did, I wanted to continue working there, I would like him to give us some reasonable excuse for Chuck Jones' discharge, that working in close cooperation with Chuck I couldn't accept the reason they gave, I mentioned the fact that I believed it was only fair for Mr. McPherson to give us an interview, some reason, and that Leo Bash, Leo Bash's word should not be taken as final since he—well, I used the word "raving," since he was a raving maniac, and that it was impossible to deal with him in a reasonable way, and that we would expect a little more consideration from Mr. McPherson, and that even in a court of law a man is innocent until proven guilty, and I might have said some more, I can't remember.

Q. Is that about all you remember of what you said?

(Testimony of Sylvia Pottle.)

A. Well, about that, that is right.

Q. Did Mr. McPherson say anything in response?

A. Well, I did mention the fact, I asked him if our work was satisfactory, and he had always been satisfactory, at least to the best of his knowledge, and he nodded his head, but he didn't say anything.

Q. Other than nodding his head? [301]

A. That is right.

Q. He didn't say anything?

A. That is right.

Q. Did anyone else besides you and Mr. Hinde say anything?

A. Somebody in the group mentioned the fact about getting paid, getting paid off.

Q. Yes. What did Mr. McPherson say about that? A. He said the checks would be mailed.

Q. And then what happened?

A. And, well, the interview was over as far as we were concerned.

Q. Did you leave the room?

A. We left the room.

Q. Where did you go?

A. Well, I walked into the locker room to get my belongings.

Q. Was anyone with you?

A. Pauline Smith was with me, one of the operators, one of the employees at Globe.

Q. About what time would you say this was that the interview ended with Mr. McPherson and you went into the locker room?

A. I would say approximately 5:30 p.m.

(Testimony of Sylvia Pottle.)

Q. Did anything take place in the locker room while you were in there?

A. Yes; Leo Bash followed me. [302]

Q. Did he talk to you? A. He did.

Q. What did he say to you?

A. He said, "Sylvia," he says, "I feel terrible about this." He says, "I think you are backing the wrong union." He said, "You don't know what you are doing."

And I says, "Leo," I says, "There is only one thing for me to do under the circumstances," I says, "There is no reason for you to say that I am backing the wrong union." I says, "This is a union that has always been fair with us and dealt with us very fairly, and we have always been happy working at Globe with this union, and I have never had any reason to believe that it couldn't continue."

So he says, "Well," he says, "Sylvia," he says, "We just have to get rid of the communists."

Q. Did you say anything in response to that?

A. I says, "That is kind of a steep remark to pass. Do you have any proof to back it up, that there are any communistic activities in this union?"

I said, "I personally have never seen it, I have never heard or seen of any communistic activities. What makes you pass a remark like that?"

Q. What did he say, if anything?

A. He said, "Well,—" he says, "The ACA will never come back in here again," he says, "And if you are wise," he says, [303] "You will get out while the getting is good."

(Testimony of Sylvia Pottle.)

Q. Was that the end of that conversation?

A. The end of that conversation as far as I can remember.

Q. Then did you get your hat and coat and leave?

A. That is right.

Q. Did you talk with Mr. Bash again after that?

A. Yes.

Q. When?

A. He called me on the telephone the following night, or the night after that.

Q. Where were you when he telephoned you?

A. Well, I was visiting a neighbor upstairs from where I live, he had called my home, my husband told me that I was upstairs, and he called me up there.

Q. And in any event, you got a telephone call while you were visiting this neighbor?

A. That is right, that is right.

Q. And did the person identify himself?

A. That is right.

Q. What did he say?

A. "Sylvia," he says, "This is Leo. I wanted to call you and talk to you."

Q. What was the conversation you had with him then?

A. Well, the conversation lasted exactly 40 minutes, it is very difficult to say everything, but I can give you an [304] idea of what the conversation was about. He told——

Q. Well, as best you recollect what he said and what you said.

(Testimony of Sylvia Pottle.)

A. He said, that he wanted to read a letter that was submitted, the letter which was submitted to Mr. McPherson in regards to Chuck Jones. He read that letter to me on the telephone. And he said, "Sylvia," he says, "If I knew—" after he read the letter, of course, he said, "Sylvia, if I knew that this letter would have caused such a bombshell," he says, "I never would have submitted it in the first place."

Q. What did you say to that?

A. I said, "Leo, that is the trouble with you, you are so hotheaded, you do things before you think." I says, "That is what has been the trouble all along." He said, "I know it," he said, "I realize that," and he says, but he says, "It just had to come to a head sometime and——"

Trial Examiner Ruckel: Beg pardon?

The Witness: "It just had to come to a head sometime." And I said to him, "Well," I says, "I think I have a general idea of what it was all about, I think the company was going to start with Chuck Jones and go right down the line."

He says, "You have a general idea."

Trial Examiner Ruckel: He said what?

The Witness: That the company——

Trial Examiner Ruckel: He said what in reply to that? [305]

The Witness: You have the general idea. [306]

* * *

Q. What was your purpose in joining the group?

Mr. Ernst: I object to it as immaterial.

Trial Examiner Ruckel: She may answer.

A. Well, due to the conditions for the past week

(Testimony of Sylvia Pottle.)

at Globe, I mean the discharge of the junior employees against our wishes, and then the ultimate discharge of Chuck Jones, I felt that my position was insecure, besides the unjustness of Chuck Jones' discharge. [309]

* * *

Cross-Examination

By Mr. Ernst:

Q. In the course of that conversation with Mr. Bash, did he ask you to come back to work?

A. No. On the contrary, he told me that as much as he would like to see me back there, he couldn't possibly hire me back. As a matter of fact, he thought that it would be against the law for him to hire me back.

Q. He talked to you for 40 minutes over the phone? A. 40 minutes. [313]

Q. And what was the general gist? What was he trying to get over?

Trial Examiner Ruckel: What was she trying to get over to him?

Mr. Ernst: Trying to get over to her, as far as she could tell.

A. I understood that he was quite sorry that the whole thing had started.

Q. (By Mr. Ernst): He was in a sense apologizing for what he had done?

A. That is right, apologizing to me for what had happened.

(Testimony of Sylvia Pottle.)

Q. And, as I understood, he read you the letter to try to tell you why he had started this?

A. Well, I don't know what his purpose in reading the letter to me was. After all, I just worked there like everybody else. I imagine his purpose was——

Trial Examiner Ruckel: We don't want your imagination.

Q. (By Mr. Ernst): What did he say about his purpose?

A. Well, I think I have put it on the record. He said that if he had known what the results would be, if he had known what a bombshell he would have put on the thing, he never would have started it and sent that letter in, in the first place.

Q. When was this telephone conversation?

A. It was approximately 8:30 p.m. I remember, because I was on my way to the show the following night. [314]

Q. January 22nd, Saturday?

A. I believe it was a Friday night, wasn't it? Friday night.

Q. Friday is the day when all of these occurrences took place.

A. Was it on a Friday?

Q. Yes.

A. The day I went back to work? Well, then, it happened the following night, Saturday.

Q. On Saturday night?

A. That is right.

Q. At 8:30 p.m. Saturday night, January 22nd?

A. Yes.

Q. Now, did Leo Bash talk to you at all per-

(Testimony of Sylvia Pottle.)

sonally and directly in the afternoon of the 21st?

A. What are you referring to? What time.

Q. Friday, when this group were around him and talked about getting Jones back to work?

A. I don't believe Leo saw me until he came back from the outer office, which was the administrative office. I mean he came from that direction. I don't know whether he was in the men's room or the administrative office.

Q. He came into the operating room?

A. He came into the operating room.

Q. And previous to that he had been——

Trial Examiner Ruckel: Don't both all talk at once. [315] You asked her a question. What is the question you are asking her, when she saw Bash that afternoon? Is that the question?

Mr. Ernst: I can't recall now.

Mr. Brotsky: Did Bash talk to her when the group was around him. She answered that he didn't see her until he came back from the outer office.

Mr. Ernst: I think that the record can stand. I don't trust your recollection, Mr. Brotsky.

Trial Examiner Ruckel: Ask her another question.

Q. (By Mr. Ernst): Now, at 4:15, as I understand it. Mr. Risley talked to you and asked you to come and join the group?

A. He informed me as to what had happened and asked me if I would join the group.

Q. And at that time he gave you his version of the discharge of Chuck Jones?

(Testimony of Sylvia Pottle.)

A. After I asked him what the reason was.

Q. What the reason for the group was?

A. After I asked him what the reason for Chuck's discharge was.

Q. And he then told you the version and then you said that you would join the group, is that correct?

A. Well, yes. Well, the words I used were, "I will be right over."

Q. Previous to that time had the group been there and talking to Leo Brash? [316]

A. I did see a few people around. I was a little bit busy. I came over at four o'clock and at four o'clock took over. My back was towards the group. I don't know what was going on until I heard Leo Bash's voice.

Q. And then it was after you heard Leo Bash's voice, that Bruce Risley came over, is that correct?

A. That is right.

Q. And when you joined the group, was Bash there? A. No, he wasn't.

Q. And then, as I understand, you were with the group a few minutes and then Bash came into the operating room from outside?

A. That is right.

Q. And did he talk to you?

A. All he said was, "You too, Sylvia? I thought you had better sense than that."

Q. What did you say to that?

A. I said, "Well, Leo, give me a reasonable excuse for all this."

(Testimony of Sylvia Pottle.)

Q. And did he give you any excuse or reply to you at all?

A. No. That was the last I spoke to him until we discussed our discharge.

Q. On the telephone? A. No, heavens no.

Q. What do you mean until you discussed [317] it?

A. Until I was fired by him. That is the last words he spoke to me until I was fired.

Q. In between did he ask you to go to work again?

A. Yes. That was just before he told us we were fired. He pointed to me and said, "Will you go back to your position?"

Q. What did you say?

A. I said, "When Chuck Jones is reinstated."

Q. And is that substantially what was said back and forth to all of the employees there at that time?

A. That is right. I think I added one more thing. I think I added, "Or a reasonable excuse for his discharge."

Q. Then when Bash said, "You are fired," what did you do?

A. Well, all of the group walked into Mr. McPherson's office directly.

Q. You walked directly into—what is it, sort of across the hall into the room on the other side of the hall?

A. Yes, across the hall to the administrative office.

(Testimony of Sylvia Pottle.)

Q. And when you got over there, did you ask for Mr. McPherson?

A. Well, Mr. McPherson, as I recall, came towards us.

Q. He happened to be coming to you or, at least, he was coming towards you when you were coming in the door?

A. I can't recall. He was there. That is all I know.

Q. Now, were you the first person to speak to McPherson? A. I wasn't.

Q. Did you spend much time there with him? How long were [318] you there with him?

A. It couldn't have been over a period of between five and ten minutes.

Q. Five or ten minutes?

A. I don't think it was ten. It was closer to 5 to 7 minutes.

Q. Did McPherson talk to you at all?

A. He didn't talk to me.

Q. He didn't talk to you at all?

A. No. I did all the talking.

Q. Now, did anyone ask Mr. McPherson why Bash had fired Jones? A. I did.

Q. Why Bash had fired Jones?

A. I did. I asked him.

Q. Did you ask him why Bash had fired Jones?

A. I didn't ask him why Bash had fired Jones. I asked Mr. McPherson to give us—well, the conversation was that Hinde was the first one to talk and he said, "Leo fired us." And Mr. McPherson said, "That is right." [319]

(Testimony of Sylvia Pottle.)

And then I said a few words and in the course of that conversation I asked Mr. McPherson if he would please give us a reasonable excuse for Chuck Jones' discharge, since we couldn't accept the fact that he was incompetent, having worked with him so closely for that time.

Q. Did he say that he was discharged because he was incompetent?

A. Mr. McPherson didn't answer me. [320]

* * *

Q. (By Mr. Ernst): Mrs. Pottle, when you were talking to him, did Leo Bash ask you to come back at that time? A. Oh, no, no.

Q. He gave no indication of that at all?

A. No, not that he wanted me to come back to work, no.

Q. He did say, though, if you were wise, you would get out of this while the getting was good?

A. That is right. We were talking about the Union.

Q. And he didn't suggest that if you got out of it, you could come back to work? [321]

A. No, no. I don't remember him suggesting that at all.

* * *

Redirect Examination

By Mr. Berke:

Q. I am not sure whether you testified about this or not. Did you get your final pay check in the mail?

A. Yes, I did.

(Testimony of Sylvia Pottle.)

Q. And I show you General Counsel's Exhibit 10 and ask you if you received that in the mail, too, or one similar to that?

A. That accompanied my check.

Mr. Ernst: If you want to simplify things, I am willing to stipulate that all the checks went out and what went with them was one of those notices.

Mr. Berke: I accept the stipulation.

Trial Examiner Ruckel: The record will [322] so show.

* * *

MALCOLM G. PARKS

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berke:

Q. Will you give the reporter your full name and address, Mr. Parks? [325]

A. Malcolm G. Parks, 1840 Sunnydale Avenue, San Francisco.

Q. Were you ever employed by Globe Wireless?

A. Yes, I was.

Q. When were you first hired?

A. September of 1946.

Q. And when did you last work there?

A. My last shift was on January the 20th, 1949.

Q. Did you work continuously from September, 1946, to January 20, 1949? A. Yes.

(Testimony of Malcolm G. Parks.)

Q. Were you a member of any union when you were hired at Globe?

A. I got my job through the Union. I wasn't actually a member. I immediately joined the Union, though.

Q. That is, you joined the Union after you became an employee of Globe? A. That is right.

Q. What Union was that?

A. ACA, CIO, Local 9.

Q. Did you remain a member of that Union throughout your employment at Globe?

A. Yes. [326]

* * *

(The documents heretofore marked General Counsel's Exhibit No. 11 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 11

(Copy)

Oct. 6, 1948

To the Staff of Globe Wireless, Ltd.

The National Labor Relations Board has advised the Company today, October 6, 1948, that in the election held on September 29, 1948, no union received a majority of votes cast. Under the circumstances, there is no Union which has been lawfully certified as the proper collective bargaining representative of our employees, the question has arisen as to whether the rejection of the Union appearing on the ballot

(Testimony of Malcolm G. Parks.)

should be interpreted by this company as an authorization of a union not appearing on the ballot. The Company makes no such concession.

The policy of the company previously stated is reaffirmed:

1. No changes in the wages, hours and working conditions to the detriment of the employees of the company are contemplated.

2. The Company is ready and willing to bargain collectively with a union whose officials have complied with the requirements of section 9 of the National Labor Relations Act, as amended, and which has been certified by the National Labor Relations Board as the lawfully authorized collective bargaining agent.

/s/ NEIL D. BROWN.

NDB:MG

Received July 27, 1949.

Q. (By Mr. Berke): After that notice, General Counsel's Exhibit 11 appeared on the bulletin board, was there any action taken by your committee with respect thereto?

A. We took up a couple of other grievances with the management.

Q. Whom did you meet with and when?

A. It was probably October 20th, somewhere around there in that approximate time, with Mr. Brown and Mr. McPherson, and I believe that is the one that Mr. Boatwright was present at.

(Testimony of Malcolm G. Parks.)

Q. That is, General Boatwright who has been referred to here by others? A. That is right.

Q. What was that meeting about?

A. Mainly concerning the combining of APO's, or the point to point operators with APO's, performing the same duty, and the shortened work week. [330]

GENERAL COUNSEL'S EXHIBIT No. 12

November 6, 1948

To the Staff of Globe Wireless Ltd.

When the Globe-ACA agreement terminated August 15, 1948, the Company adopted the policy and advised employees that wages, hours and working conditions of the expired contract would be maintained, so far as practicable, until a bargaining agent has been certified by the NLRB. The Company has met its obligations.

On the other hand, some employees have taken advantage of the above policy to the extent that a situation now prevails which is inimical to the Company's interests and employees as a whole. This situation is exemplified by the statement headed, "Union Management Meeting," November 3, 1948, which purports to convey to Globe employees the results of a meeting on that date between certain members of the operating and administrative staffs of the Company.

In general, the subjects listed were covered in the meeting, but not as outlined in the above report,

(Testimony of Malcolm G. Parks.)

which implied recognition by the Company of some union at the present time, attempts to put the Company at a disadvantage, and differentiates between certain groups of employees present, belittling one against the other.

The first fallacy is the heading, "Union-Management Meeting," which it was not, because the Company recognizes no union at this time and will not do so until one has been properly certified by law. Secondly, the "Union" contended nothing, took up nothing, and discussed no subject since the "Union" was not present. The meeting was between a total of ten Globe employees and no union was involved.

In the report are other discrepancies as to content, continuity and intent, but it is not the purpose of this notice to refute them.

This is to advise that:

1. The Company will not recognize any shop steward, shop chairman, shop committee, nor any group purporting to represent employees in collective bargaining unless such representatives are designated in accordance with the National Labor Relations Act.

2. The Company will not infringe upon any employee's right to engage in Union activities, but failure to perform duties on the job remains a cause for discharge.

3. Whenever necessary, the Company will meet with any employee to discuss subjects

(Testimony of Malcolm G. Parks.)

relating to his wages, hours and working conditions.

/s/ NEIL D. BROWN.

Q. (By Mr. Berke): Do you recall the discharge of Chuck Jones? A. Yes, sir.

Q. Were you present and working on the day that it took place?

A. No, I was at a scheduled Union meeting for the entire [336] Globe shop at the Union Hall on my day off, Friday, January the 21st, 1949, and at 1:30 in the afternoon Chuck came down and notified us that he was fired.

Q. Was this meeting that you attended a regularly scheduled meeting, or was it one called especially to discuss Mr. Jones' discharge?

A. No, this was scheduled, I believe, the preceding Tuesday for the purpose of what we should do in the matter of taking up grievances with the Company.

Q. And you went to this meeting at 1:30 on the 21st? A. That is right, that is right.

Q. And you say Mr. Jones was present at the meeting? A. Yes.

* * *

Q. (By Mr. Berke): You say Mr. Jones stated that, or notified [337] you people that he was fired, is that right?

A. That he was fired. We said, "How come? What was the reason?"

(Testimony of Malcolm G. Parks.)

Trial Examiner Ruckel: Never mind that. What did you do as a result of that?

The Witness: We discussed the matter, in that "Is Chuck going to be the first man that they pick off, and you and I next," that is concerning the entire shop. So we decided that we should go down there and protest the case in that there was no good legitimate reason for him being fired, that we had heard so far, so we decided to talk to the management, and get a reason for his being fired, in other words, protest his being fired.

Q. (By Mr. Berke): Who was the spokesman for him? A. Myself.

Q. And was anyone to accompany you?

A. Mr. Jones.

Q. And what were you to ask, and who were you to see?

A. We were going to our immediate superior supervisor, which was Mr. Bash at the time, and ask him, make a formal protest in his firing, or get a good reason for his being fired.

Q. Were you going to ask for Mr. Jones' reinstatement? A. That is right.

Q. And did you, pursuant to that, go to the Company's offices and see Mr. Bash? [338]

A. At 4:15 that same afternoon Mr. Jones and myself walked into the operating room, and Leo was relatively close to the door, I walked up to him and says "I understand Chuck Jones has been fired, I am here to make a formal protest," and that "He should be reinstated."

(Testimony of Malcolm G. Parks.)

Q. What did Mr. Bash say?

A. Mr. Bash made the statement that he didn't fire him; he suspended him.

Q. Did he say who fired him?

A. Well, he said he suspended him. I said, "Well, can we get him reinstated?" And Mr. Bash says, "I have nothing—I have no authority to reinstate; he is suspended."

Q. Was Mr. Jones standing alongside of you?

A. Right beside me, yes, possibly a little to the rear.

Q. Did any of the other people working on the shift at that time gather around you?

A. At that time practically all of the operators came up to help protest the case.

Q. What operators, on what watch or shift?

A. That was the operators on the 4:00 to mid watch.

Q. Do you know the names of those people, as you can recall them?

A. I can remember some of them, yes.

Q. Well, will you give those that you recall?

A. Bruce Risley, Sylvia Pottle, Rudy Niemi—— Niemi,—— [339]

Mr. Ernst: I have no objection to them leading the witness on the number of names of these people if it would speed it up any.

Mr. Berke: Oh, fine!

The Witness: As I remember the number——

Q. (By Mr. Berke): Viola Williams, was she there? A. Viola Williams is another one.

(Testimony of Malcolm G. Parks.)

Q. What about Pauline Smith, was she there?

A. Yes, sir.

Q. And Al Hinde, was he there? A. Yes.

Q. Did any of those people that gathered around participate in your discussion with Mr. Bash?

A. As I remember it, there was pretty much of a chime in from each individual, that they——

Q. Do you remember what they said?

Mr. Ernst: Excuse me. I wonder if I could have that answer read back?

Trial Examiner Ruckel: Just a minute. Pretty much of a what?

Mr. Berke: "Chime in."

The Witness: That they wanted to have Chuck Jones reinstated on his job, or else a good reason for his being fired.

Q. (By Mr. Berke): What did Bash say in response to their request? [340]

A. "Get back to your positions."

Q. Did you see Bash do anything while you were standing around there conferring with him, or attempting to confer with him?

A. There was a lot of hand throwing and gestures, but—and we also asked to meet with somebody that had the authority to reinstate Charles Jones.

Q. Whom did you make that request of?

A. Mr. Bash.

Q. What did he say to that?

(Testimony of Malcolm G. Parks.)

A. He had no—he gave us no authority to leave the operating room.

Q. Now, for how long did you remain around his desk? A. Well, roughly an hour.

Q. What occurred after that?

A. He, as I remember, as I remember, he went across the—out of the operating room. When he came back he took all of our time cards and stamped them out.

Q. You saw him do that, did you?

A. Yes, sir.

Q. Did he say anything to you?

A. Not right—then he came over and he says, as I remember, he offered us the cards, he says, “Go back to the circuit.” We told him we would go back to the circuit when Chuck Jones was reinstated, or a good reason given for his being fired.

Q. What did he say to that?

A. He said, “You are fired.”

Q. Did he say that to the group?

A. That is right.

Q. At large? A. Yes.

Q. Did anything else occur that day after that?

A. Well, then we immediately went across into the main offices to find out for sure, to get the—

Q. Now, who did you mean by “we”?

A. The entire group that was told were fired.

Q. All the people that you have named?

A. That is right, and this was my day off, so I was fired on my day off.

Q. And when you—

(Testimony of Malcolm G. Parks.)

Mr. Ernst: I ask that the last statement be stricken as not responsive, and as a conclusion.

Mr. Berke: Oh, I don't know.

Trial Examiner Ruckel: It may stand.

Q. (By Mr. Berke): Now, you say you went across the hall. What was your purpose in going across the hall?

A. To confirm the fact that we were fired with one of the higher officials.

Q. Well, did you see one that was higher than Mr. Bash? A. Yes, sir. [342]

Q. Whom did you see?

A. We walked into the little ante-room, the waiting room that leads into all the main offices of the Company officials, the telephone operator was sitting right to the left of us, and I was standing right next there, I told her that we wanted to see Mr. McPherson, so she called Mr. McPherson, as I remember, and said, "There is a delegation out here to see you," so time went by, he finally came out of one of the other—not his own office, but one of the others, and eventually came over to us.

Q. And who spoke first?

A. The first words was from Al Hinde, who said, "Mr. Bash fired us."

Q. And what did Mr. McPherson say to that?

A. He says "That is right."

Q. Was there anything more said by anybody?

A. Well, each one of us, I don't—no, not "each

(Testimony of Malcolm G. Parks.)

one of us"—I asked him what the reason for firing us was. Mr. McPherson had no answer.

Q. He didn't say anything?

A. No. And then about that time Sylvia Pottle asked for permission to talk to him, and she carried on the conversation from there on.

Q. And do you remember what she said?

A. Mainly in the respect that we had appreciated our jobs, [343] had been happy on it, did not understand the cause for Chuck Jones being fired. What was the reason? Mr. McPherson had nothing to say. Part of the time he was nodding his head, but the rest of the time said nothing. Then somebody asked about the pay checks, and he said they would be mailed, so we considered that final and left the building.

Q. Did you later attend a union meeting?

A. Yes, at 8:00 o'clock that evening.

Q. That is 8:00 o'clock, January 21st?

A. That is right. That was the second section of this same meeting from the afternoon so that all shifts could attend one or the other meetings.

Q. This meeting too was a regularly scheduled meeting?

A. That is right; that is right.

Q. And was the matter of Mr. Jones' discharge discussed at that meeting also?

A. Yes, it was, not only his but the rest of us too.

Q. And those on the 8:00 to 4:00 shift?

A. That is right, that had already been fired.

(Testimony of Malcolm G. Parks.)

Q. Oh, I am sorry. I mean 4:00 to mid shift?

A. Oh, 4:00 to mid, that is right.

Q. Yes.

A. Yes, that is correct, because we weren't in there after 4:00 o'clock.

Q. What was decided at that meeting? [344]

A. We decided that two of us should go up there, and me being the shop chairman should be the spokesman again, go up and see if any Company officials were on duty at midnight there, and find out if there was any change in status toward the rehiring of all the employees fired, including Chuck Jones.

Q. And who was to be the spokesman?

A. Myself, and Al Hinde was to accompany me.

Q. And did you and Al Hinde go to the offices of the Company that evening?

A. Yes, soon after midnight we went in there. Mr. Bash was sitting up at his supervisor's desk. We walked over to him, and I said to Mr. Bash, "Has there been any change in policy toward the firing of Chuck Jones and ourselves this evening?" He says, "No." And the rest of the operators in the operating room came out to discuss the same thing, and we requested that we see some official that could rehire us.

Q. About what time was this?

A. Well, this was between 12:15 and 12:30 a.m.

Q. And that would be in the morning of January 22nd?

A. January 22nd, yes.

(Testimony of Malcolm G. Parks.)

Q. Who were the people that gathered around you on that occasion?

A. That was the entire mid watch. Let's see if I can remember them.

Mr. Brotsky: Did you say the entire mid [345] watch?

The Witness: The entire mid watch, yes. I don't remember names.

Q. (By Mr. Berke): All right, let's see if you recall. Was Lorraine Conger one of those?

A. Yes, sir.

Q. John Gyuresik?

Mr. Ernst: I would like to get them down. Will you hold it just a second until I catch up with you.

A. Rudy Niemi.

Mr. Ernst: O.K. Conger.

Q. (By Mr. Berke): John Byuresik?

A. Yes.

Q. Virginia Kelso? A. Yes, sir.

Q. Jesse McLin? A. Yes, sir.

Q. Homer Mulligan? A. Yes, sir.

Q. Louis Pena? A. Yes, sir.

Q. Violet Leach?

A. I am pretty sure she was there, yes.

Q. What is your answer on that?

A. Yes, she was there.

Q. David Sheaffer? [346]

A. Yes, he was there at midnight.

Q. George Rosengren? A. Yes, sir.

Q. And did those people participate in your discussion with Mr. Bash?

A. Yes, they all from one time to another made

(Testimony of Malcolm G. Parks.)

the statement that they would like to have Mr. Jones rehired, or a good reason given for his being fired, and if he was not able to answer it we would like to speak to some official that could, that had the authority.

Q. Was any reference made to those who had been on the 4:00 to mid watch who had been discharged?

A. That was concerning Chuck Jones that we were trying to get reinstated, including ourselves, that was previously at 4:15 fired, or after 4:15.

Q. You had talked with Mr. Bash about the others as well as about Chuck Jones?

A. That is right, yes.

Q. What did Mr. Bash say to your request and that of the group?

A. I made the statement, I says, "Well, I guess there is nothing we can do about it." Then he says, "Yes, there is something we can do," and he walked out of the room and came back with a building guard, and Al Hinde and myself left the building. [347]

Q. Did he say anything to the guard when he came back with him?

A. I never heard anything said.

Q. Did the guard accompany you out of the building?

A. Yes, sir.

Q. What time was that?

A. 12:30 a.m.

Q. And where were the rest of the group that had gathered?

A. Sitting around Mr. Bash's desk.

(Testimony of Malcolm G. Parks.)

Q. Do you know whether or not Mr. Bash usually worked at midnight?

A. I never saw him work that in the two years that I was there. [348]

* * *

Cross-Examination

By Mr. Ernst:

Q. This letter that accompanies Exhibit 2 refers apparently to a previous meeting between you and Mr. McPherson? [350] A. That is right.

Q. Was that an oral meeting? A. Yes.

Q. How did you arrange that meeting?

A. By telephone.

Q. You called him on the telephone and asked him if you could meet him? A. That is right.

Q. And was it arranged without trouble?

A. He told me that we could come on Friday—I won't say Friday—about two days later, he said that he would meet with me, and then on that day he called me early in the morning about 10:00 o'clock in the morning and told me that it would have to be postponed.

Q. Didn't you want the meeting originally with Mr. Brown? A. That is right.

Q. And Mr. Brown was ill at the time?

A. That is right.

Q. And then it had to be postponed over the weekend and Mr. Brown was still ill, so you met with Mr. McPherson?

A. That is right. He made the statement that

(Testimony of Malcolm G. Parks.)

Mr. Brown's wishes was for the meeting to go ahead.

Q. And at the conclusion of the meeting, you asked for a meeting with respect to the lay-off, or did Mr. McPherson ask for that meeting? [351]

A. As I recall, he made the statement that there was no change in policy and he would not meet with anyone representing the Union.

Q. Well, from the first letter, the first paragraph of your letter of January 5th, apparently he asked you to let him know what was the opinion of the employees on the short work week or lay-offs?

A. That is right.

Q. And what I wondered was, did Mr. McPherson bring up this matter or did you bring it up?

A. Mr. McPherson actually made the meeting with me. When I walked in and sat down, he said, "What do you want to know?" And I said, "I want to know, or I am here to find out what you have to say, as you called me in." Yes, that was the case, because we had already asked for a meeting with Mr. Brown and they would not meet with a Union representative, so they finally agreed to meet with me alone.

Q. And that was this meeting of January the 3rd?

A. Yes.

Q. I thought you said earlier that you had telephoned McPherson and asked for——

A. Apparently that was a previous meeting.

Q. Did you then on quite a few occasions during the month that you were shop steward, call McPherson and ask for a meeting? [352]

(Testimony of Malcolm G. Parks.)

A. Yes. [353]

* * *

Q. Now, at 12:00 o'clock midnight was it usual for Mr. Brown [356] to be present? A. No.

Q. Or for General Boatwright to be present?

A. No.

Q. And it wasn't usual for Leo Bash to be present? A. That is right.

Q. Was it usual for any person in the hierarchy of the Company above the watch supervisor to be there at that time?

A. As far as people across the hall, no, that is right. It wasn't the custom.

Q. In other words, the top person present at the time would be supervisor on watch?

A. That is right.

Q. And at that time the regular supervisor on watch was away ill, was he not?

A. I believe that is correct, Mr. Shanks.

Q. And the acting supervisor was Mr. Rosengren?

Mr. Brotsky: When you say, "at that time," you have reference to what date?

Mr. Ernst: I have reference to the shift that started at midnight or 12:01 a.m. on January 22, 1949.

Q. (By Mr. Ernst): I am assuming that you are referring to the same time? A. Yes.

Q. Now, was Mr. Rosengren one of the ACA members? [357] A. Yes.

(Testimony of Malcolm G. Parks.)

Q. Was he present at the meeting at 8:00 o'clock?

A. I don't remember.

Q. Now, did you during your experience as chairman of the shop committee on any occasion seek a meeting with Mr. McPherson or Mr. Brown or General Boatwright through the acting supervisor on the midnight to 8:00 a.m. shift or the supervisor on that shift?

A. I don't believe I did. [358]

* * *

Q. (By Mr. Ernst): Did the meeting in the afternoon discuss the question of who the group was going to see?

A. Yes. Mr. Bash was our immediate supervisor.

Q. The decision was made to see Mr. Bash?

A. Yes.

Q. Did you discuss seeing Mr. McPherson or Mr. Brown or General Boatwright?

A. I'm sorry, I didn't hear your question.

Q. Did you discuss seeing Mr. Brown or General Boatwright or Mr. McPherson?

A. Not by name, but somebody that had authority to give us a decision.

Q. Well, I mean, did you, when you were discussing whom to see, when you and Mr. Jones were to call on the Company?

A. All I remember was the decision to see Mr. Bash. [359]

* * *

What did you do during the period between the

(Testimony of Malcolm G. Parks.)

conclusion of the meeting at 3:00 o'clock and the time that you arrived at the office of the Company?

Mr. Brotsky: I object on the ground that it is irrelevant and immaterial.

Trial Examiner Ruckel: What is relevant about that?

Mr. Ernst: I am trying to go into the timing of their arrival, and it seems to me there was no reason why they couldn't have gone before 4:00 rather than after 4:00.

Mr. Brotsky: What relevance has that?

Mr. Berke: How material is that? The point is what they did rather than what they could have or might have done.

Trial Examiner Ruckel: 4:00 o'clock is a busy time, is that the point? Is that the busiest time, 4:00 o'clock?

Mr. Ernst: Well, it is busy after that period of time and the new shift came on at 4:00 o'clock and various other things that might go into their question of the decision to go before 4:00 or after 4:00.

Mr. Berke: Is the witness testifying now? [360]

Trial Examiner Ruckel: I am going to sustain the objection.

Mr. Ernst: Mr. Examiner, would that ruling apply to any questions that I had as to the reason why they selected coming in at 4:00 or shortly after 4:00, rather than some earlier time?

Trial Examiner Ruckel: Well, I do not know. I don't quite understand what your theory is. I asked

(Testimony of Malcolm G. Parks.)

whether that was your busiest period and apparently it was not, from what you said.

Mr. Ernst: No, the period from about 4:00 or 4:30 until 8:00 is the busiest on the Manila circuit but you have other busy periods on other circuits.

Trial Examiner Ruckel: Well, you could have asked why didn't they come in at 3:00 o'clock rather than 4:00. Is one time more critical in the operation of the Company rather than some other time?

Mr. Ernst: Well, I think here it related to the expectation that the other people would be called into the thing and that the delegation wasn't to be only Mr. Parks and Mr. Jones.

Mr. Berke: Well, what difference does that make?

Trial Examiner Ruckel: Well, that is clear in the record. It is clear they all joined in.

Mr. Berke: So far the evidence is that they have.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): Was it the decision at the meeting that all [361] of the persons there would join with you in making the protest?

A. Of Mr. Jones and myself, talking to Mr. Bash, could not get anywhere, yes.

Q. Now, as I recall, somebody here testified that the decision was made that you and Mr. Jones were to lodge a formal protest with Mr. Bash, is that correct? A. Yes.

Q. Now, what actions were you instructed to take in the course of making your formal protest?

Mr. Brotsky: If any?

(Testimony of Malcolm G. Parks.)

A. What action? I don't understand what you mean.

Q. (By Mr. Ernst): Were any more detailed instructions given to you than the words, "You and Chuck Jones shall make a formal protest"?

A. No.

Q. Now, on how many occasions before had you made a formal protest to the Company?

Mr. Berke: I object to that as irrelevant, immaterial, incompetent, and has no bearing on the issues. [362]

Q. You, I understand, asked on behalf of the group, that Mr. Jones be reinstated?

A. That is right.

Q. And you said that practically all of the people who came up chimed in. Did they ask essentially the same action of Mr. Bash?

A. That is right.

Q. Did Mr. Bash ever offer or ask the people to go back to [364] their jobs?

A. After he had stamped our time cards and came over and offered them to us, he said, "You can go back to your circuit," or something along that line, and we told him the same answer, that we wanted Chuck Jones reinstated or a good reason for his being fired.

Q. And that you wouldn't go back to work until he was?

A. That is right. [365]

* * *

(Testimony of Malcolm G. Parks.)

Redirect Examination

By Mr. Berke:

Q. Did Mr. Bash have any supervisors under him?
A. Yes.

Q. About how many, do you know?

A. One scheduled supervisor on each watch.

Q. That would be about——

A. Three. [375]

* * *

Q. (By Mr. Brotsky): In your experience as Shop Chairman and a steward did you negotiate grievances directly with Leo Bash on any occasions?

A. Yes. [377]

* * *

Recross-Examination

By Mr. Ernst:

Q. You stated that you asked Leo Bash to arrange meetings for you with management?

A. Yes, that was prior to the expiration of the contract.

Q. Yes, prior to the expiration of the contract?

A. That is right.

Q. For how long prior to the expiration of the contract were you chairman of the Shop Committee?
A. The early part of July.

Q. From the early part of July until the middle of August?
A. Yes.

Q. And the times that you asked Mr. Bash to arrange meetings were all prior to August 15th then?
A. Yes. [378]

* * *

(Testimony of Malcolm G. Parks.)

Mr. Ernst: It, as I recall, indicates considerable of this background history that Counsel for the General Counsel raised by his direct examination of this witness, and picks up the detail of that and what happened during this interim period from, I think it was October 6th or so, when this first document was referred to, and continuing up until the date of this document.

Trial Examiner Ruckel: I am going to admit it for the limited purpose of showing, if it does show, the activity of this witness in comparison with the activity of other employees, including Mr. Jones, and it is denied for all other purposes.

(Thereupon, the document above referred to as Respondent's Exhibit No. 5 and marked for identification, was received in evidence.) [382]

* * *

PAULINE GERTRUDE SMITH

a witness called by and on behalf of the General Counsel of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berke:

Q. What is your full name, please?

A. Pauline Gertrude Smith.

Q. Where do you live, Miss Smith?

A. 26 Leona Terrace, San Francisco.

(Testimony of Pauline Gertrude Smith.)

Q. Were you ever employed by Globe Wireless?

A. Yes, I was.

Q. When were you first hired?

A. Approximately September 27 of '48.

Q. In 1948?

A. Yes. Wait a minute. 1947. Sorry.

Q. Is that correct now, September 27, 1947?

A. 1947 is right.

Q. When were you last employed by that company?
A. January 21, 1949.

Q. What position did you hold on January 21, 1949?

A. I was classified as a teletype operator, receiving the [388] pay of a teletype operator, but I did not do teletype operator's work.

Q. What work did you do?

A. Traffic clerk.

* * *

Q. Were you a member of any union when you first went to work at Globe?
A. No.

Q. Did you join any union after you became employed there?
A. Yes.

Q. What union? [389]

A. ACA, CIO, Local 9.

Q. And for how long did you continue to be a member of that union?

A. Until January, until the present date. [390]

* * *

Q. Do you recall a union meeting that was scheduled for January 21, 1949?
A. Yes, sir.

(Testimony of Pauline Gertrude Smith.)

Q. Did you attend that meeting? A. Yes.

Q. At what time? A. 1:30.

Q. In the afternoon? A. Yes.

Q. And did a matter concerning Charles Jones come up at that meeting? A. Yes.

Q. What was that matter about?

A. I learned that Chuck Jones had been [391] fired.

* * *

Q. (By Mr. Berke): Did you go to the office of Globe later that day? A. At four o'clock.

Q. And did you go to work at four o'clock?

A. Yes.

Q. Now, there has been some testimony here about Mr. Parks and Mr. Jones having made certain representations to Mr. Leo Bash and a group of people on the four o'clock shift having gathered around in support of whatever Mr. Parks and Mr. Jones were discussing with Mr. Bash.

Were you one of that group? A. I was.

Q. Can you tell us why you gathered with the group, or why you joined it?

A. When Mr. Parks and Mr. Jones first came in I could overhear the conversation. Mr. Parks made the remark to Mr. Bash that he wanted to formally protest the firing of Chuck Jones. I heard Mr. Bash say, "Oh, you do, do you?" The conversation was not progressing very well, so I decided to join them.

Q. And was your purpose in joining to support

(Testimony of Pauline Gertrude Smith.)

the protest, or the attempt to discuss the matter of Mr. Jones' discharge? A. Right. [392]

* * *

Q. (By Mr. Berke): Tell us whether or not your employment was terminated that day with Globe? A. On the 21st?

Q. Yes. A. It was.

Q. How did that come about?

A. Mr. Bash told me that I was fired.

* * *

Trial Examiner Ruckel: Mr. Bash told you you were fired. Give us his words as near as you can.

The Witness: He said, "This humiliates me beyond words but you people are fired. Now get out."

Trial Examiner Ruckel: Is that all he said, as far as you recall?

The Witness: That is all.

Q. (By Mr. Berke): What did you do after that?

A. The group immediately went to Mr. McPherson's—not to his office but to the Executive Department.

Q. Were you in that group? A. I was.

Q. Tell us whether or not you heard Mr. McPherson say anything [393] to the group or to anyone in the group.

A. The conversation started out by Al Hinde making the remark to Mr. McPherson, "Leo Bash has fired us." And McPherson said, "That is right."

Someone asked, I don't know who, "Why?"

(Testimony of Pauline Gertrude Smith.)

McPherson replied, "This Company received an ultimatum approximately at 4:20 that you people refused to work unless Chuck Jones was reinstated."

He further stated that this Company cannot tolerate such action.

Q. (By Mr. Berke): Was there anything else said that you can recall?

A. No, nothing else that I recall.

Q. What happened then?

A. If I recall correctly, Sylvia Pottle took the stand to speak.

Q. She addressed Mr. McPherson, did she?

A. Right.

Q. After she spoke, were there any others who spoke? A. Not that I remember.

Q. Well, what happened then?

A. You mean you want the conversation or just what happened?

Q. No, what happened?

A. Everyone dispersed, left the building.

Q. Where did you go? [394]

A. Miss Pottle and I returned to the operating room, to the cloak room.

Q. And what did you go to the cloak room for?

A. For our wraps and clean out our lockers.

Q. Did anything occur in there?

A. Mr. Bash followed us in and spoke to Miss Pottle.

Q. Did you hear what he said to her?

(Testimony of Pauline Gertrude Smith.)

A. I did.

Q. Where were you standing at the time?

A. Practically three feet from her.

Q. And could you hear distinctly what was being said?

A. Very distinctly.

Q. Will you tell us what was said and who said it?

A. Mr. Bash said to Miss Pottle, "Sylvia, I am very surprised that you have joined with the wrong outfit. Why don't you come over on the Company's side?"

He says, "You know we have just got to get rid of these Communists in this office."

To this, Miss Pottle replied that she had observed no Communist activity and she thought he was making a very broad statement with no evidence and she told him that until a better Union came along, that she would stick to the ACA.

Q. Did you hear anything else?

A. Not that I recall.

Q. Did Mr. Bash make reference to any other Union? [395]

Mr. Ernst: I——

Trial Examiner Ruckel: She may answer. Did he mention any other Union?

The Witness: Yes, he did.

Q. What did he say?

A. He told her that at that very moment we could have another Union in the office, all we had to do was to make such a suggestion to the front office, that we could have any Union that complied

(Testimony of Pauline Gertrude Smith.)

with the non-Communist affidavit, preferably the IBEW.

Q. Do you recall anything more that was said?

A. Nothing more.

Q. What did you do then?

A. Miss Pottle and I left the building.

Q. Did you subsequently get your pay check?

A. Approximately four or five days later I received my pay check in the mail.

Q. Now, was a picket line established at the Company premises after that? A. It was.

Q. And did you join the picket line?

A. I did. [396]

* * *

Q. (By Mr. Berke): On that occasion while you people were gathered around Mr. Bash did you see Mr. Bash leave at any time and go into any other office? A. He left the room twice. [397]

Q. Can you tell us——

A. He left the operating room.

Q. Can you tell us about what time the first time was that he left?

A. I would say approximately 4:35 the first time.

Q. Did you see where he went on that occasion?

A. No, no.

Q. About how long was he gone?

A. I would say 7 minutes.

Q. And when was the next time?

A. Around 5:00 o'clock.

Q. Did you see where he went then?

A. No.

Q. Do you know how long he was gone?

(Testimony of Pauline Gertrude Smith.)

A. Approximately 7 or 10 minutes.

Q. What took place after he returned the first time?

A. He went to the teletype section, called to Mr. McDowell, who was the Supervisor on that shift, he said, "Say, Mac, do you have anything for me to do?" Mac replied, "No, there is nothing to do."

Q. And what took place when he returned the second time?

A. He went to the time clock, gathered up the time cards of everyone present, stamped them out, he came to the group and offered the time card to each individual. He wanted to know if we wouldn't go back to work. [398]

Q. Was this before or after he had told you people that you were fired?

A. If I recall correctly, it was leading up to it. [399]

* * *

Q. (By Mr. Ernst): Now, then, you went into the operating room at 4:00 o'clock?

A. Right.

Q. When did you next see this Dolores Bruce, the Suddarth girl, and Port; was that the third one?

A. Right.

Q. When did you next see them?

A. We were talking to Mr. Bash, we were having our group meeting.

Q. But when you were having your group meeting with Mr. Bash——

(Testimony of Pauline Gertrude Smith.)

A. They still were sitting in the cloak room and were watching us talking to Mr. Bash. [403]

Q. You could see them at that time?

A. Yes, sir.

Q. And did Mr. Bash go and talk to them?

A. No.

Q. What did the girls who were sitting in the cloak room next do?

A. They weren't next to anything, they were in the cloak room.

Q. What did they do after you saw them sitting in the cloak room while you and the other group were talking to Mr. Bash?

A. They were just sitting there until——

Q. Until what happened, that is what I wanted to know?

A. We had been sitting, we had been sitting for approximately 15 minutes, and all of a sudden I saw them coming out into the operating room, taking over positions. Who told them to go, or whether anyone told them to go I don't know.

Q. Now, during the period after you arrived you, as I understand it, started to do your regular work at 4:00 o'clock?

A. That is right.

Q. And how long did you continue doing your regular work?

A. I would say 20 minutes.

Q. About 20 minutes. And what time did Mr. Jones and Mr. Parks come in?

A. I would say 4:15.

Q. And did you notice them come in as soon as they came in? [404]

A. No.

(Testimony of Pauline Gertrude Smith.)

Q. How did it come to your notice that they were there? A. I heard their voices.

Q. You heard Parks and Jones' voice?

A. Speaking to Mr. Bash.

Q. I see. Then did you go over and join them?

A. Not immediately.

Q. When you joined the group, who else was around there? Were you one of the first to join the group, is what I am interested in. A. No.

Q. Who else was in the group when you joined it?

A. I don't recall anyone being in the group. We all joined in a more or less simultaneous manner.

Q. Had you discussed the possibility of joining such a group, when you were in the Union meeting at 1:30? A. Yes.

Q. And was it agreed that that was what you would do?

A. It was agreed that if Mr. Jones and Mr. Parks could not make a progressive conversation with Mr. Bash, that, if necessary, some of us would join in?

Q. You would join in the conversation?

A. Yes.

Q. And in your conversation you were going to join in by asking that Mr. Jones be put back to work? [405] A. Right.

Q. And what conversation occurred prior to the time that you joined in?

A. I heard Mr. Parks say to Mr. Bash, "I want to formally protest the firing of Mr. Jones."

(Testimony of Pauline Gertrude Smith.)

Bash's remark to that was, "Oh, you do, do you?"

That is all that was said.

Q. And then you joined? A. Right.

Q. And by that time others had already joined the group?

A. Hadn't already. We all joined simultaneously.

Q. At what time did that meeting with the Union at 1:30 terminate?

Mr. Berke: I object to that. Why is that relevant as to when it terminated? It has been gone into before and I don't see any materiality. Mr. Trial Examiner, whether they terminated four hours later or ten seconds later. How is it material to the issues here?

Trial Examiner Ruckel: Objection sustained.

Mr. Ernst: As I understand your ruling, Mr. Examiner, I will not be permitted to go into the timing of the meeting and the period between the time these people left the Union meeting and came to the Company and what they did during the interim, and that is the case not only as to the 1:30 meeting, but also as to the 8:00 o'clock meeting? [406]

Trial Examiner Ruckel: Well, if you question the accuracy of her testimony as to the time that the group met and that she came to the office——

Mr. Ernst: No. I want to go into what happened after she left the meeting.

Trial Examiner Ruckel: I can see no relevancy except that it bears on the accuracy of the testimony as to the time of these other events.

(Testimony of Pauline Gertrude Smith.)

Mr. Ernst: That isn't my point. I have an entirely different point, which I think is entirely relevant.

Trial Examiner Ruckel: Well, would you care to state your point? I think you stated it yesterday.

Mr. Ernst: Yes, I did state it in substance yesterday. I want to go into the matter of whether they had time to go in and make their protest before they went to work rather than on Company time and what considerations led to their doing it on Company time rather than prior to going to work.

Trial Examiner Ruckel: Objection sustained.

Mr. Ernst: Just to speed this up, Mr. Examiner, you mean that, my statement as to my interpretation, both as to 4:00 o'clock and 8:00 o'clock? [407]

* * *

Q. Now, when you were with Mr. Bash around 5:15, your meeting broke up, is that right?

A. When he told us we were fired, the meeting didn't break up. We went directly to the main office.

Q. Then the meeting moved from Mr. Bash's office into the main office at about 5:15?

A. That is right.

Q. And prior to that time, as I understand your testimony, Mr. Bash came into the operating room from the hall, took the time cards, stamped them out, then came over to the group and did something

(Testimony of Pauline Gertrude Smith.)

with the time cards and made some statement. Now, what was the statement he made?

A. I told the statement before. He offered each one in the group his time card and said, "Now, get back to work."

Q. And did he do that individually to each one of the people [408] there? A. If I recall, yes.

Q. And do you recall what the answer you gave was, when he asked you that?

A. I told him that I would go back to work as soon as Chuck Jones was reinstated.

Q. Now could you tell me what the other people said at that time? A. I don't recall.

Q. Now, did immediately after that, he tell you that you were fired, after he had completed this conversation with the whole group?

A. I believe that is the way it was.

Q. Well, did you listen to this conversation during the whole period from 4:20, when you joined the group, or so, until 5:15? [409]

* * *

Q. What was Mr. Bash doing during the interim when he wasn't with you and when he wasn't outside the room?

A. He was trying to help with traffic.

Q. Now, at any time did you hear Mr. Bash say anything about the fact that he had not fired Chuck Jones? A. Yes.

Q. What did he say about that?

A. He said that he did not fire Chuck Jones, that some higher authority had.

(Testimony of Pauline Gertrude Smith.)

Q. Did he mention anyone's name?

A. I don't recall any names being mentioned.

Q. Did he mention General Boatwright's name?

A. I don't recall.

Q. Did anyone of the group respond to Mr. Bash's statement that he hadn't fired him?

A. Yes.

Q. What response was made?

A. They wanted to see the person responsible for firing Chuck Jones.

Q. What did Leo Bash say to that?

A. Leo Bash said that he had no intentions of bringing anyone into the operating room to see us.

Q. Did he say that you could go see him or that you couldn't [411] go see him?

A. Yes, I believe he did.

Q. You believe he said what, you could go see him?

A. We knew where their offices were. If we wanted to see them, we could go. [412]

* * *

Q. Now, at this 5:15 meeting with Mr. McPherson, did anyone ask him to discuss the matter of Chuck Jones' discharge?

A. I don't know that the term "discharge" was used.

Q. Well, what I am getting at is whether or not the meeting with McPherson was particularly with respect to the discharge of you and the other people in your group or whether it was directed to the discharge of Jones?

(Testimony of Pauline Gertrude Smith.)

A. It was particularly directed to the discharge of Jones. [414]

Q. It was related to that. Now, did Mr. McPherson give you any information, according to your recollection of that conversation, as to why the company discharged him?

A. Miss Pottle told him that she had been working with Chuck Jones long enough to know that he couldn't possibly be discharged for incompetence, that she refused to take that as an excuse, and asked McPherson for a better one. She didn't get it.

Q. She didn't get a better excuse, is that what you mean? A. That is right.

Trial Examiner Ruckel: Did she get any?

The Witness: She didn't get any.

Q. (By Mr. Ernst): In other words, according to your recollection, McPherson said nothing at all in response to Sylvia Pottle's request for some statement as to the reason for his discharge?

A. Right.

Q. Did you ever hear anything about a request that Chuck Jones practice; that is, on January 21st? A. That I heard about it?

Q. Did you on January 21st hear anything about a request to Chuck Jones that he practice?

A. Yes.

Q. When did you hear that?

A. I heard that directly from Chuck Jones himself at the [415] 1:30 meeting.

(Testimony of Pauline Gertrude Smith.)

Q. At the 1:30 meeting?

A. ACA union meeting.

Q. And did you hear of it at any other time?

A. No.

Q. Then when you were present at four o'clock and at 5:15, did you ask either Mr. Bash or Mr. McPherson as to whether Chuck Jones was right in reporting this matter of practicing?

A. No, I don't recall anything about that.

Q. Now, as I understand, you served on the picket line for sometime after? A. Right.

Q. At that time did you people hand out any leaflets? A. We did.

Q. You didn't happen to be one of the authors, did you? A. One of the what?

Q. Of the authors, the people who wrote the material that was put in the leaflets?

A. I didn't write it. I proofread it.

Q. And do you recall that your first bulletins, at least, were numbered "Lockout Bulletin No. 1, Lockout Bulletin No. 2"?

A. I don't recall whether they were that way or not.

Q. I will find one here in a second and show it to you.

Mr. Ernst: Counsel, I am going to show the witness this. [416]

* * *

Q. (By Mr. Ernst): Were these bulletins by the group of Globe employees who are the parties to this case? A. That is right.

(Testimony of Pauline Gertrude Smith.)

Q. As I understand, they represented the position of the group as to matters in dispute?

Mr. Berke: Just a moment. The best evidence of that would be the document itself.

Mr. Brotsky: Which speaks for itself.

Trial Examiner Ruckel: Objection sustained.

* * *

ALBERT E. HINDE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: Your name, please?

The Witness: Albert E. Hinde, H-i-n-d-e, 2841 Sacramento Street, San Francisco. [423]

Q. (By Mr. Berke): Mr. Hinde, did you ever work for Globe Wireless? A. Yes.

Q. When were you first employed by the company? A. July 1, 1946.

Q. And when did you last work there?

A. January 21, 1949. [424]

* * *

Q. (By Mr. Berke): Were you a member of any Union when you first went to work at Globe?

A. Yes.

Q. What union is that?

A. ACA, CIO Local 9.

(Testimony of Albert E. Hinde.)

Q. And did you retain your membership when you went to Globe? A. Yes. [437]

* * *

The objection is overruled. You may answer. The conversation in the first part of September, 1948?

Mr. Ernst: I want to state on the record the nature of my objections, so that it will be in here.

Trial Examiner Ruckel: That is right.

Mr. Ernst: The objection is that these matters are irrelevant and immaterial to any issues before the Board, since apparently the General Counsel is now going into some unfair labor practice that occurred some time in September or alleged unfair labor practice that occurred some time in September of 1948. There is no charge filed with respect to any such unfair labor practice, the only charge that is in the record being a charge that refers to acts "that occurred on or about January 21, 1949."

The 1947 amendments to the Act say that the Board—that includes the General Counsel and the Trial Examiners are included in this—shall take no action with respect to an unfair labor practice unless a charge with respect thereto is filed and served within 6 months. [440]

There is no evidence in this record that any charge was filed with respect to an unfair labor practice or alleged unfair labor practice in September, 1948. It is now more than 6 months from September, 1948. On that ground the law prohibits

(Testimony of Albert E. Hinde.)

the Examiner or the General Counsel from taking any action with respect to such an unfair labor practice.

* * *

Trial Examiner Ruckel: Go ahead. What was your conversation the first week in September with Bash?

The Witness: I heard Mr. Bash say——

Trial Examiner Ruckel: Were you talking to him?

The Witness: No.

Trial Examiner Ruckel: Who was he talking to?

The Witness: Not at this time. He was talking to Miss Lorenzo, Miss Bruce and Miss Suddarth.

* * *

Trial Examiner Ruckel: You may answer.

The Witness: Mr. Bash said, "The Company will have nothing to do with the ACA. They are a bunch of Commies and fellow travelers."

Q. (By Mr. Berke): Did you participate in that? A. Yes.

Q. What did you say?

A. I said, "The people in this shop are the ACA. The ACA is good enough for me and I resent the Company trying to tell me what union I should belong to and how I should vote."

* * *

Q. (By Mr. Berke): Now, do you recall January 21, 1949? A. Yes.

(Testimony of Albert E. Hinde.)

Q. Did you attend a union meeting on that day?

A. Yes, a shop committee meeting.

Q. At what time? A. 1:30 p.m.

Q. And will you tell us whether or not the matter of the discharge of Charles Jones was discussed at that meeting? A. Yes.

Q. What time were you due to report to work that day? A. 4:00 p.m.

Q. Did you report to work at 4:00 p.m.? [442]

A. Yes.

Q. Where did you go when you got to the offices of the Company?

A. I punched my time card in and it was a little early, so I went into the cloak room. Then at 4:00 o'clock I went to my position on the New York Circuit.

Q. And did you remain working on that circuit?

A. Until approximately 4:15.

Q. What did you do at 4:15?

A. Mr. Parks and Mr. Jones entered the room and engaged in a conversation with Mr. Bash. I later left my position and joined them and at about the same time other employees did the same.

Q. How long did you remain at Mr. Bash's desk or in the vicinity of his desk?

A. Until 5:15 p.m.

Q. And what occurred at 5:15?

A. Mr. Bash fired me.

Q. Will you tell us how he fired you; that is, what he said?

(Testimony of Albert E. Hinde.)

A. He offered me my time card that he had previously stamped out, and before he handed it to me, he said to the group, "It humiliates me to do this."

Then after presenting the time cards to various individuals in the group, he presented me with mine and said, "Will you go back to work?"

I said, "I will go back to work, but I would rather discuss [443] this grievance first."

Q. And what did he say to that?

A. He didn't say anything. He asked the same question to the next person.

Q. When he finished asking the group the questions, what did he do or what did he say?

A. He said, "You are all fired."

Q. Then what did you do?

A. I left with the group and went to see if we could see Mr. McPherson.

Q. Did you discuss the matter with Mr. McPherson?

A. I spoke to Mr. McPherson, yes.

Trial Examiner Ruckel: Do we have to go into all this conversation with Mr. McPherson?

Mr. Berke: No, I am not going into it.

Q. (By Mr. Berke): All right, now, after the conversation with Mr. McPherson was finished, that you and others in the group have already testified here, what did you do?

A. I left the building.

Q. Did you come back to the office again at any time after that?

(Testimony of Albert E. Hinde.)

A. At 12:15 the following morning.

Q. That is January 22nd? A. Yes.

Q. Were you alone or were you accompanied by anyone? [444] A. I was with Mr. Parks.

Q. And where did you go and and Mr. Parks go? A. To the operating room.

Q. And whom did you see in the operating room?

A. Mr. Bash was the only company official present. [445]

* * *

Trial Examiner Ruckel: One thing at a time. You may answer.

A. We wanted to see if they had changed their policy of the previous afternoon and at the same time register a further protest against the firing of Charles Jones plus the employees who had been fired that afternoon.

Q. (By Mr. Berke): And with whom did you register that protest? A. With Mr. Bash.

Q. What was said to Mr. Bash either by you or Mr. Parks?

A. Mr. Parks spoke first but I don't remember what he said. Then I asked Mr. Bash, "Have you changed your policy regarding the firing of Charles Jones?"

Mr. Bash said, "I have nothing to do with it. He is out of my hands."

Q. Was there anything more said by anybody?

A. Yes. About this time other employees came and joined us in the discussion and I remember

(Testimony of Albert E. Hinde.)

Louis Pena joining the group and Leo turned to him and said, "Are you with these people, too, Louis?"

And Mr. Pena said, "I certainly am."

Q. Now, in addition to Mr. Pena who else do you recall joining the group? Was Lorraine Conger there? [446]

A. Yes.

Q. John Gyuresik?

A. Yes.

Q. Virginia Kelso?

A. Yes.

Q. Was Violet Leach?

A. Yes.

Q. Was Jesse McLin?

A. Yes.

Q. Homer Mulligan?

A. Yes.

Q. George Rosengren?

A. Yes.

Q. David Sheaffer?

A. Yes.

Q. What else took place then, after that question by Mr. Bash of Mr. Pena?

Trial Examiner Ruckel: Did Mr. Bash make a reply to Mr. Pena's statement that he was one of the group?

The Witness: No.

Trial Examiner Ruckel: What else was said?

The Witness: I don't recall Mr. Bash saying any more. Mr. Parks said, "We don't seem to be getting anywhere."

Then Mr. Bash said, "We will see about that," and left the operating room. [447]

Q. (By Mr. Berke): How long was he gone?

A. About three minutes.

Q. And when he came back, was he alone?

A. No. He had the building guard with him.

(Testimony of Albert E. Hinde.)

Q. And was anything said or done then?

A. He asked the guard to—he said to the guard, “Eject these two gentlemen.”

Q. Whom was he referring to?

A. Parks and myself.

Q. What did the guard do?

A. He accompanied us out of the building.

Q. Where were the group of people that you have just named, when that took place?

A. They were still gathered around Mr. Bash’s desk.

Q. About how long a time elapsed from the time you first went into the office to see Mr. Bash and the time that you were escorted outside by the guard?

A. About 7 to 10 minutes.

Q. Did you thereafter join the picket line?

A. Yes. [448]

* * *

Q. Well, the one that you spoke of on direct examination, of a meeting in which you heard something stated by Mr. Bash regarding the ACA, and you replied regarding the ACA. Do you recall your answers on direct examination?

A. Yes, sir.

Q. Do you now know what I mean when I talk about the meeting you referred to?

A. Yes. I wouldn’t consider it a meeting, I would consider it a conversation.

Q. Oh, I thought there was a reference to a meeting. I am [455] glad that is cleared up. In other words, it was just a casual conversation that

(Testimony of Albert E. Hinde.)

you happened to overhear and that you entered into? A. That is right.

Mr. Berke: Now, wait a minute. I wish counsel wouldn't characterize the conversation. The conversation which he overheard, whether it was casual or not, I think is a matter to be determined from the record.

Trial Examiner Ruckel: There was a conversation.

Q. (By Mr. Ernst): Now, prior to that time the Company made it very obvious—to everybody in the place that it wouldn't deal with the Union until it had complied with the non-Communitic affidavit provisions?

A. It had a notice on the board to that effect, but it didn't say exactly those words to my knowledge, to my recollection. The reason I engaged in this heated conversation with Bash was because I had read the part in that document that was placed up on the Company bulletin board that the Company could not negotiate with the ACA because it had not complied with the Taft-Hartley Act.

Q. All right. Now I want to see if I can't locate that particular thing since you started to talk about it.

Was that a notice posted along about July 20th, according to your recollection? Well, let me show it to you. I don't want to ask you questions like that. That may be a little [456] unfair.

A. I believe it was around that time. [457]

(Testimony of Albert E. Hinde.)

RESPONDENT'S EXHIBIT No. 8
American Communications Assn.

July 20, 1948

To the Staff of Globe Wireless, Ltd.

In order to keep you current on the status of relations between this company and the American Communications Association, we advise you herewith regarding our meeting of July 19:

1. The Company agreed to continue relations with ACA until August 15, 1948, under terms of the present agreement.

2. Since the Company has been notified by NLRB of forthcoming elections based on petitions filed by certain staff members, it cannot, after August 15, recognize ACA as sole bargaining agent for all Globe employees.

3. In an effort to prove its contention that ACA represented the majority of Globe employees, Mr. Barlow offered a petition signed by 75% of the staff, according to his statement. The Company refused to accept this petition or to check the signatures and names thereon because the method used by ACA to obtain same was not in accordance with provisions of the National Labor Relations Act.

4. After long discussion, the ACA refused point blank to make any effort to arrange NLRB certification or petition for an employee election as

(Testimony of Albert E. Hinde.)

provided by law. Also, it flatly refused to file non-Communist affidavits.

5. ACA also refused to take any action on the Company's suggestion that it get together with IBEW in an effort to start contract negotiations prior to August 15 and/or certification by NLRB of either Union.

6. ACA contended that the majority of Globe employees had approved of its refusal to sign non-Communist affidavits and the definite stand taken per above. The Company refused to acknowledge this statement as being true or to accept the petition allegedly proving this point.

7. The Company asked ACA to go to the Labor Board so that the question of who represented the employees would be settled as provided by law. If ACA continues to refuse the procedures set up by law, then the Company cannot deal solely with ACA, and instead will post a statment of working conditions and guarantees fair to all.

8. Meanwhile, and at any time after the present contract expires, the Company desires to meet with whatever Union is certified by the Labor Board.

NEIL D. BROWN.

Q. (By Mr. Ernst): Was it your recollection that Bash was passing on substantially the same information as what was in those published notices regarding the ACA?

(Testimony of Albert E. Hinde.)

Mr. Berke: Now, wait a minute. I object to that. That isn't what the witness said.

Trial Examiner Ruckel: Objection sustained. The witness related the conversation.

Mr. Ernst: Well, then I will have to see if I can find the right document.

Mr. Berke: Mr. Ernst, is it your purpose to show that Mr. Bash's statment to the witness represented the Company's view?

Mr. Ernst: I think that there is no doubt about the Company's view, that it was not going to deal with the ACA until it was certified, and was ready to when it would be certified. Now, the latter part I don't think was said by Bash, I am not going to tell you that it was.

Mr. Brotsky: We will stipulate to that at any time, that that was the Company's position. [458]

* * *

Q. (By Mr. Ernst): Were you a member of the negotiating committee that dealt with the Company? A. No, no.

Q. Did the committee give the members reports as to what happened at the meetings?

Mr. Brotsky: Just a moment.

We will object to this, Mr. Examiner, as not having been gone into on direct, repetitious.

Mr. Berke: It concerns internal affairs.

Mr. Ernst: This is going to the material that I objected to that you insisted on putting in with respect to what happened in September. [459]

Mr. Berke: But he just got through testifying

(Testimony of Albert E. Hinde.)

he was not a member of the negotiating committee, didn't he?

Mr. Ernst: Right.

Mr. Berke: Then how would he know——

Trial Examiner Ruckel: How does that bear on the conversation which he made himself a party to in the first week in September?

Mr. Ernst: I think the materiality of it to that is that the union had made it extremely clear to the Company, and I think also to the membership of the Union, that it was not going to sign the affidavits no matter what happened, and that therefore Mr. Bash's particular statement that did not have that condition with respect to "Until the ACA complied with the law" was in effect immaterial.

Mr. Brotsky: Mr. Examiner, may I say this: The Board has held consistently that the subjective effect upon a particular individual of statements by supervisors is not important. They adopted the objective standard that we all know exists in the law. Now, if——

Trial Examiner Ruckel: Let's don't argue it any further. I don't see the materiality. Objection sustained.

Mr. Ernst: Mr. Examiner, it is the only way I can get in the record the fact that everybody in the place realized that the ACA was not going to conform, and that that was the reason the company was not dealing with it, and that was known to the people around there. Now, apparently, as I understand it, the General Counsel has brought in a new

(Testimony of Albert E. Hinde.)

unfair labor practice now that is not covered by any charge, to the effect that we intimidated these people in September, and has put this witness on to prove that. Now, the nature of the intimidation, the effect of any statements depend upon what the people understood and knew at the time.

* * *

Q. (By Mr. Ernst): Now, at 12:15 a.m. on January the 22nd, did you register a protest with Mr. Bash? A. Yes.

Q. Now, what do you mean by the phrase "register a protest?"

A. I told Mr. Bash that I protested the discharge of Charles Jones and the additional employees that were discharged the previous day.

Q. In other words, when you say "registered" you mean nothing more than making that statement which you have just quoted to Mr. Bash?

A. To make the impression on Mr. Bash that I was not in agreement with what was done.

Q. Now, during the time that you were there at 12:15 did the rest of the employees there who joined you chime in on the discussion the way they did at the 4:15 to 5:15 meeting?

A. Yes, they registered remarks with Mr. Bash.

Q. Now, at the 12:15 meeting did Mr. Bash tell you in whose hands it was, the matter that the said was out of his hands? A. No, no.

Q. Did you at 5:15 tell Mr. Bash that you wanted a settlement of the grievance by the return

(Testimony of Albert E. Hinde.)

of Chuck Jones to work before you would go to work? [465] A. No, I didn't say that.

Q. Or did you ask for a good reason for it?

A. No, I merely stated that "I am willing to go back to work but I would rather discuss this grievance first."

Q. In other words, you in no way told him that you would not work until you could discuss the grievance?

Mr. Brotsky: Just a moment.

A. I said——

Mr. Brotsky: Wait a moment.

Trial Examiner Ruckel: Find out what he said. Go ahead.

The Witness: I had already made the statement, I said, "I am willing to go back to work, but I would rather discuss this grievance first." That is what I said.

Q. (By Mr. Ernst): And Mr. Bash made it clear to you that he was not going to discuss it any more, didn't he?

A. He ignored my statement and presented the time card to a person standing next to me.

Q. Now, is this the only statement that you made during the period from 4:15 to 5:15?

A. No.

Q. What else did you say to Mr. Bash?

A. At the first part of the discussion, just about the time I—oh, maybe, a few minutes after I joined the group I remember asking Mr. Bash when we were trying to find out [466] the reasons,

(Testimony of Albert E. Hinde.)

for Jones' discharge, he was evasive, he didn't give any reason beyond the fact that——

Q. What did he say rather than——

A. Well, he said "Inefficiency" I believe. I am not certain.

Q. You are not certain of what he said?

A. Some word to that effect. And then the remark I made, the further remark I made to Bash, "Was it because of those letters that we put on the union bulletin board," and he says, "No."

Q. In other words, you were referring then to the letters protesting the return of the 40 hour week?

A. No, we were referring to the letters protesting the layoffs. [467]

* * *

Q. Was that a meeting a formal meeting arranged in advance?

Mr. Berke: Wait a minute. I object to this as going beyond the scope of the direct examination.

Trial Examiner Ruckel: Objection sustained.

Mr. Berke: It is irrelevant. [468]

* * *

Mr. Ernst: Now, Mr. Examiner, there has not been any showing that this man acted as a member of the ACA, of the ACA Grievance Committee at that meeting. That is what I am going into, I am asking the questions leading up to that, and you are preventing me from doing so. [469]

Trial Examiner Ruckel: Well, it is shown that

(Testimony of Albert E. Hinde.)

he is a member of the group representing the employees of the company.

Mr. Ernst: Right, that is quite a bit different than the matter of his—and they being there as a representative of the ACA and a member of its Shop and Grievance Committee.

Mr. Berke: Well, he has testified he was a member of the committee.

Mr. Ernst: Quite right, he has testified to that.

Mr. Berke: And attended one meeting with management.

Mr. Ernst: Quite right, he testified he was a member, and he testified to the meeting.

Mr. Berke: What difference does it make whether the meeting was formal or informal?

Mr. Ernst: Well, I assume that the relevance of this meeting is, has something to do with his being a representative of the ACA at that particular time, and I want to go into the meeting to find out whether it was a meeting with the ACA or with somebody else. I want to know how it was arranged, who were there, whether they were ACA members or not, and whether they were members of the Grievance Committee or not.

Trial Examiner Ruckel: I don't think that is relevant. The point was was he there representing himself, or was he there representing other employees in activity. Whether it [470] was actually sponsored by the union or whether it was formal, or whether it was informal, I don't think makes any difference.

(Testimony of Albert E. Hinde.)

I am going to sustain the objection. We are just wasting time arguing about it. Go ahead.

Mr. Ernst: I don't see how I can put in my side of the background, if I am stopped at every moment while the General Counsel puts in anything he wants to as to this background.

Trial Examiner Ruckel: You can take exceptions to it.

Mr. Ernst: I assume that I have automatic exceptions to all of these rulings.

Mr. Brotsky: Why does Counsel have to labor the record with these repeated exceptions?

Mr. Ernst: I don't want to have another hearing in the case, if I can avoid it. [471]

* * *

Mr. Ernst: The point is that they have gone into this whole period from September up to January 21st. I objected to going into anything prior to January 21st. They have gone into it.

Trial Examiner Ruckel: Therefore, we should go into everything else before January 20th, is that it?

Mr. Ernst: No, but we should get a rounded picture of the background, if you are going to go into it, or a rounded picture of any alleged unfair labor practices.

Trial Examiner Ruckel: The only thing was we want to know whether Mr. Bash said or didn't say what the witness attributed to him as having been said, so I can't assure you that I will permit you to

(Testimony of Albert E. Hinde.)

take this witness over later on as your own witness on that point, because I doubt the relevancy of it either now or then. [479]

* * *

LORRAINE E. CONGER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: State your name, please?

The Witness: Lorraine E. Conger, C-o-n-g-e-r.

By Mr. Berke:

Q. Where do you live, Miss Conger?

A. 1941 Taraval Street, San Francisco.

Q. San Francisco? A. Yes.

Q. Were you ever employed by Globe Wireless?

A. Yes, I was.

Q. When were you first hired by that company?

A. November 4, 1947.

Q. And when did you last work there?

A. January 22, 1949.

Q. What job did you hold on January 22, 1949?

A. I was classified as a teletype operator, but I was working at the cable dispatch desk, or the traffic desk. [482]

* * *

Q. Do you recall the night of January 21, 1949?

A. Yes, I do.

(Testimony of Lorraine E. Conger.)

Q. What occurred on that evening that makes you recall it particularly?

A. Well, at about 7:30 in the evening I received a phone [483] call from Mr. Bash.

Q. How do you know it was Mr. Bash that called you?

A. He identified himself.

Q. And will you tell us what he said and what you said in the course of that conversation?

A. Well, I hadn't been up very long, and I was getting ready to go to a union meeting, and the phone rang, and I answered, he says, "This is Leo."

And I was surprised, and answered "What are you doing down there at this hour of the night?"

Q. Where were you referring to?

A. To the office; I could hear the background, the noise.

Q. Go ahead.

A. And he said, "Well, I don't know whether anybody else has told you or not, but there has been some trouble down here, and we fired Chuck Jones and a bunch of other people who protested the [484] firing."

Q. What did you say to that, if anything, or did he say something more?

A. He kept on talking.

Q. Will you tell us what else he said as you recall it?

A. He said that "Jones and Risley, those two stinkers, had been engaged in too much union activity." And then he said, "This ACA outfit is nothing more than a bunch of Communists."

(Testimony of Lorraine E. Conger.)

At this point I said, "Wait a minute now! Who are you calling a Communist? I will have you know that I am a member of the twelfth generation, my family, in this country, and I can hardly be called a Communist."

Q. What did he say to that?

A. He said, "Well, take my word for it, anyway they can't do you any good." And then he asked me, told me that he liked me, and my work was tops, and that my job was there if I wanted it, and he wanted to know if I was coming in, and I said that I didn't know, that I would let him know a little later, in plenty of time.

Q. Was there anything more said by either one of you?

A. He made the remark, volunteered the information that he had taken Chuck's card into General Boatwright. He didn't say when or why or anything.

Q. What card was he referring to?

A. His time card.

Q. Was there more to the conversation? [485]

A. I don't recall if there was or not.

Q. Have you exhausted your memory on that?

A. I guess I have.

Q. Do you recall whether or not he made any reference to his having been a member of the Union, or with reference to the New York Office?

A. Oh, yes.

Q. Does that refresh your memory?

A. Yes.

(Testimony of Lorraine E. Conger.)

Q. Will you tell us what it was he said?

A. He said that the New York Office force had walked out, and that there had not been any contact with them since about 4:15.

Q. What was it he said about his having been a member of the Union?

A. Oh, let's see—he mentioned that he had been a member of the ACA and had been involved in a strike, and how hungry he got, and then he says, "It is pretty nice to keep eating, you know."

Q. Was there anything else that you remember about the conversation?

A. I don't believe there was.

Q. You say you think that was all?

A. I think that was all.

Q. What watch did you work? [486]

A. Midnight to 8:00.

Q. And were you due to go to work midnight that night he called you? A. Yes.

Q. Now, this union meeting that you had scheduled to go to, when was that scheduled?

A. That was scheduled regularly for 8:00 p.m.

Q. Was that a meeting that had been scheduled some days before? A. Yes, it was.

Q. Did you go to the meeting?

A. Yes, I did.

Q. And while at that meeting did you learn about the discharge of Charles Jones——

Mr. Ernst: I submit that she has testified about learning about it.

(Testimony of Lorraine E. Conger.)

Mr. Berke: Let me finish the question.

Q. (By Mr. Berke): —as well as having previously been told by Mr. Bash about this?

A. Yes.

Mr. Ernst: I object.

Trial Examiner Ruckel: Objection overruled.

Q. (By Mr. Berke): Now, did you go to work at midnight? A. Yes, I did.

Q. Where did you report for work? [487]

A. Where?

Q. Yes. A. At the cable desk.

Q. And did you proceed to work?

A. Well, it was pretty badly messed up.

Q. What was pretty badly messed up?

A. The file system on the desk, which is my job.

Q. Did you continue working throughout the period of your watch? A. No.

Q. What happened?

A. At about 12:15 or 12:20 Mr. Hinde and Mr. Parks came in.

Q. And did you see where they went?

A. They walked back to Mr. Bash's desk.

Q. Did you join Mr. Hinde and Mr. Parks?

A. We all went back in a group.

Q. That is, all the people on the mid watch?

A. That is right.

Q. About how long after Mr. Bash and Mr. Hinde and Mr. Parks were there?

A. Within about three minutes, I suppose.

Q. What was your purpose in joining the group with Mr. Hinde and Mr. Parks?

(Testimony of Lorraine E. Conger.)

Mr. Ernst: Are you asking about her personal purpose or that of the group? She said she went back with the group. [488]

A. Well, I didn't feel too secure, in view of what had happened already.

Q. Well, tell us what you meant by that, what your purpose was in going up with the group with Mr. Hinde and Mr. Parks.

A. It was to protest the discharge of these other people.

Q. Do you know whether or not there was any activity over the circuits during that period; that is, from the time you came to work at 12:00 o'clock up to the time that you joined the group and went up to Mr. Bash's desk?

A. There was no activity on the circuits.

Q. Was there any activity, if you know, between the—strike that.

How long did you and the group remain at Mr. Bash's desk?

A. From about 12:20, when we went back.

Q. Until? A. Until about 1:30.

Q. From that period of time, 12:20 to 1:30, was there any activity over the circuits?

A. There was not.

Q. What was the condition of the Manila circuit, if you know?

A. Well, they didn't seem to have any signals there.

Q. Was that what is commonly known as a fading period? A. That is right.

(Testimony of Lorraine E. Conger.)

Q. While you and the group were assembled at Mr. Bash's desk, [489] did Mr. Bash say anything to you people? A. He said several things.

Q. Well, tell us what he said, as best you remember it, and the words that he used.

Trial Examiner Ruckel: Go ahead.

A. I don't remember.

Q. (By Mr. Berke): Well, whatever you remember, just tell us whatever you recall he said.

Tell us this: What was he doing during the period of time that you were assembled around there?

A. Well, Mr. Parks and Mr. Hinde had come in and started talking to him about the reinstatement of other people and Chuck Jones, and Leo said that he didn't have the power to do it. He said, "It is out of my hands."

Q. All right, now, what else took place; that is, what else did you hear, what else did you see, while you were there?

A. Mr. Bash got up from his desk and walked out into the hall and got the guard and had Mr. Parks and Mr. Hinde taken out of there.

* * *

Q. Did he talk to you people or say anything to the group [490] in between these telephone calls or while he was making the telephone calls or while he was making the telephone calls? A. Yes.

Q. What did he say?

A. He made a remark about this being in the hands of the General, the General was running things and he would run things his way.

(Testimony of Lorraine E. Conger.)

Q. What else did he say?

A. He looked at Louis Pena and said, "Louis, are you in this, too?" And Louis said, "Yes, sir, I am."

Q. Did he make any more remarks to the group?

A. He looked around the group and said, "Well, if you are going to tie yourselves to the tail of this Communist kite, you can sink with it."

Q. Was there anything more said by him?

A. Not that I heard.

Q. Did he quote General Boatwright, if you recall?

A. That the General had given orders to fire everybody, if necessary.

Mr. Ernst: I ask that that be stricken as hearsay.

Trial Examiner Ruckel: It may stand, not as to whether the General said it or not but its repetition by Bash would make it admissible as coming from Bash.

Mr. Ernst: I was just going to the form, Mr. Examiner. I realize that. I wanted her to quote him, if possible. [491]

Mr. Berke: She is quoting Mr. Bash, if you don't recall the conversation.

Q. (By Mr. Berke): Do you recall whether there was anything else said?

A. Not that I remember.

Q. Did anybody in the group make any response to Mr. Bash's remarks?

(Testimony of Lorraine E. Conger.)

A. I think there was someone in the group made some remark, but I don't remember the remark.

Q. You don't remember it. What happened then about 1:30 a.m., which is the end of the period that the group was assembled?

A. Well, about that time Leo went to the card rack, took our time cards out.

Q. What did he do with them?

A. He had them in his hand for a moment, and then laid them down beside the telephone. He said, "I don't think it is necessary to go through this motion of stamping you out. You all know you are fired."

Q. What did you people say or do?

A. We went to the cloak room and cleaned out our lockers and got ready to leave. [492]

* * *

Q. (By Mr. Berke): Did Homer Mulligan and Violet Leach work on your watch?

A. Yes, they did.

Q. Do you know whether or not they were present in that group that was assembled around Mr Bash that night?

A. They were.

Q. Did they join in with the rest of the group in requesting reinstatement of Mr. Jones, do you know?

Mr. Ernst: I object to her testifying as to that, the other people can testify to it.

Trial Examiner Ruckel: She may testify what she saw and [495] heard.

A. They were there, they took part in this.

(Testimony of Lorraine E. Conger.)

Q. (By Mr. Berke): Now, when the group left the company premises that night did you leave alone, or did somebody—that is, did the group leave as such, or was somebody with that group that did not belong to that watch?

A. Well, the building guard took us all out in a body.

Q. How did that happen?

Mr. Ernst: I submit it is immaterial, I object to it as immaterial.

Mr. Berke: It is very material.

Trial Examiner Ruckel: Go ahead.

Did somebody call up for him, or do you know?

A. After Mr. McDowell and Mr. Chin came in Mr. Bash went out and got the building guard, and said, "Take these people out of here."

Q. (By Mr. Berke): And did the guard go out with you? A. Yes, he did.

Mr. Berke: You may take the witness. [496]

* * *

Cross-Examination

By Mr. Ernst:

Q. I see. Now, at the time you came to the cable desk on the morning of January 22nd, you stated that it was badly messed up. Would you give me the detail of why you so described it?

A. Well, the work on the cable desk consisted of filing the [500] day's traffic sent and received only when in solid sequence. Nothing was solid on that desk that night.

(Testimony of Lorraine E. Conger.)

Q. You mean everything is usually in order, numerical order? A. That is right.

Q. At the time you arrived was there anybody working at the desk that you replaced?

A. There was nobody over there.

Q. Now, you were at the Union meeting at 8:00 p.m.? A. That is right.

Q. And at that time did the group there hear of what happened at 4:15 to 5:30 in the afternoon?

A. We did.

Q. And did they hear that the persons who had been involved had been discharged?

A. Yes, sir.

Q. And did you know what action those persons took at 4:15 to 5:30?

Mr. Brotsky: Just a moment. You mean was she told what action they took?

Mr. Ernst: I will reframe it.

Q. (By Mr. Ernst): Were you told at the meeting what actions they took? A. Yes, sir.

Q. And did the actions that you took from 12:15 to 1:30 seem to you to be essentially the same as your fellow-workers [501] took between 4:15 and 5:30?

Mr. Brotsky: Just a minute. I will object to that.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): What did they tell you that the other people had done between 4:15 and 5:30?

(Testimony of Lorraine E. Conger.)

Trial Examiner Ruckel: Is that material? She didn't go into that on direct. She simply said she heard further comment that Jones had been discharged.

Mr. Ernst: I think it is material to find out whether at 12:15 she started to do something that was essentially the same as what her fellow-workers had done 8 hours previously, and had been discharged for.

Trial Examiner Ruckel: We are concerned with what she did when she got to the office.

Mr. Ernst: Pardon me?

Trial Examiner Ruckel: We are concerned with what she did when she got to the office.

Mr. Ernst: Well, but I submit that it is relevant that when she did so she knew that persons who had done exactly the same thing, or essentially the same thing 8 hours before had been discharged for it.

Mr. Brotsky: Her knowledge can be inferred by the facts of what she did and what she was told.

Trial Examiner Ruckel: Objection sustained. Let's go ahead. [502]

* * *

Q. He didn't give you that much detail. Now, when you arrived at the office at about 12:00 o'clock, did you tell Mr. Bash, as you had promised him you would at the end of your conversation at 7:30, whether you were going to work that night?

A. I had called at 9:30 p.m. and notified the office. [505]

(Testimony of Lorraine E. Conger.)

Q. What did you tell the office at 9:30?

A. I told them simply, "Tell Leo Lorraine will be in at midnight as usual."

Q. Now, was this after the meeting was over?

A. It was. [506]

* * *

VIRGINIA KELSO

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Exxamination

By Mr. Berke:

Q. Will you give the Reporter your name and address, please?

A. Virginia Kelso, 529 Masonic Avenue, San Francisco.

Q. Miss Kelso, were you ever employed by Globe Wireless? A. Yes, I was.

Q. When were you first hired by that Company?

A. October '46.

Q. And when did you last work there?

A. January 22nd.

Q. What year? A. '49.

Q. And what position did you hold on January 22, 1949?

A. I was an automatic printer operator.

Q. What watch did you work on?

A. Midnight to 8:00 in the morning. [511]

* * *

(Testimony of Virginia Kelso.)

Q. Now, at the time you went to work for Globe, were you a member of any union?

A. No, I wasn't.

Q. Did you thereafter become a member of a union? A. Yes.

Q. What union? A. ACA. [512]

* * *

Q. Do you recall January 21, 1949?

A. Yes, I do.

Q. How did you happen to recall that night in particular?

A. Because about seven o'clock that evening I had a telephone call from Leo Bash.

Q. How do you know that it was Leo Bash that telephoned you?

A. Well, I know his voice and he also said, "Jinnie, this is Leo," when I answered the phone.

Q. Will you please tell us the conversation that you had with him on the phone?

A. Well, I just said, "Hello."

And he said, "Jinnie, we have had some trouble down here this afternoon."

He said, "The whole four to mid shift has been fired," and there wasn't much I could say.

Q. What did you say?

A. I said, "Oh, God!"

Q. Did he say anything more?

A. He said, "I am going to have to ask you, if you want your job or not."

Q. Did you make any response to that?

(Testimony of Virginia Kelso.)

A. I said, "Yes, of course, I want my job."

And he said, "Well, will you be coming in tonight at [513] midnight?"

And I said, "Yes, Leo, I will be there at midnight."

Q. Was there anything more that was said?

A. No. He said, "I will see you then."

Q. Did you report to work at midnight?

A. Yes, I did.

Q. Do you know whether or not there was a union meeting scheduled for your watch that night?

A. Yes. I went to the eight o'clock meeting.

Q. You did go to that eight o'clock meeting. And did you hear about Mr. Jones' discharge at that meeting?

A. Yes, there was quite a bit of discussion.

Q. Now, did you report for work at midnight?

A. Yes.

Q. Where did you go?

A. I went over to my New York circuit.

Q. And what was the condition of your circuit?

A. It was terrible.

Q. What do you mean by terrible?

A. There was no contact with New York at all.

* * *

Q. (By Mr. Berke): Did you remain working throughout the period of your watch?

A. There was nothing for me to do at the time, so I went over to the teletype department. I was talking to the girl over there.

(Testimony of Virginia Kelso.)

Q. Now, were you in the operating room all the time? A. Yes.

Q. Did anything take place while you were in the operating room that was unusual?

A. Yes. Mr. Hinde and Mr. Parks came in.

Q. And what did you see them do?

A. They went over to Leo's desk. [515]

Q. Did you later join them?

A. Yes, I did.

Q. Were there others there besides Parks and Hinde? A. Yes, there were.

Q. Can you tell us whether or not John Gyuresik was there? A. Yes, sir.

Q. Violet Leach there? A. Yes, sir.

Q. Jesse McLin? A. Yes.

Q. Homer Mulligan? A. Yes.

Q. Louis Pena? A. Yes.

Q. George Rosengren? A. Yes.

Q. David Sheaffer? A. Yes.

Q. And Lorraine Conger? A. Yes.

Q. Who has just testified? A. Yes.

Q. What was your purpose in joining the group?

A. Well, I felt that if they could fire one person as they did Chuck Jones my job was not very safe either. [516]

Q. And did you speak to anyone while you were assembled there? A. No, I never said a word.

Q. Did you say anything to Mr. Bash?

A. No.

Q. Did Mr. Bash make any comments to the group?

(Testimony of Virginia Kelso.)

A. Yes, from time to time he made comments.

* * *

Q. All right. What else did you hear?

A. Well, he asked Louis Pena, he said, "Are you in this too, Louis?"

And Louis said, "Yes, I am." [517]

Trial Examiner Ruckel: Did he say anything else?

The Witness: I was trying to think.

Q. (By Mr. Berke): Do you recall whether he said anything else or not?

A. I can't remember anything.

Q. Have you exhausted your memory on the conversation?

A. Well, that is all I can remember, until he went over to the time clock.

Q. What did he do at the time clock?

A. He took all our cards out.

Q. What did he do with those cards?

A. Well, he laid them on the desk by the phones there, and he turned around to us and he said, "I don't think there is any use in my going through the motions of timing you out." He says, "You all know you are fired."

Q. Was there anything else that he said then?

A. Oh, and he also said, he says, "And you are also on strike."

Q. Now, you say you have exhausted your memory with respect to the previous conversation?

A. Yes.

(Testimony of Virginia Kelso.)

Q. As to his going to the time clock?

A. Yes.

Q. Does this refresh your memory, do you recall whether or not he said anything about tying yourself up with the [518] communists, or hitching yourself to the communist star?

A. Oh, yes, he did, he made some remark about we were tying ourselves to the tail of a commie, or something like that, I don't remember the actual words, and that we were going to sink with them.

Q. Did he make any reference to General Boatwright?

A. Yes, he said, he says, "You know you are dealing with the General of the Army now, and he is going to do things his way."

Q. Do you know what position General Boatwright held with the company?

A. He is a Vice President.

Q. Do you recall whether or not he told you that the company wanted to get the union out, and that they were starting with Chuck Jones and Bruce Risley?

A. Leo told me that on the phone.

Q. That evening?

A. No. the next night.

Q. This was after you had been discharged?

A. After I had been fired, yes.

Q. All right. Well, after he told you that you were discharged what did you do?

A. Well, we just sat around there and the phone rang once, and he answered that, and he had made all these telephone calls, and then Mr. McDowell and Mr. Chin came in, and when they came [519]

(Testimony of Virginia Kelso.)

in Leo went out and came back with the building guard.

Q. And what happened when he returned with the building guard?

A. He said, "Take these people out of here."

Q. Did the guard escort you people out?

A. Yes, we went into our lockers first and got our stuff.

Q. Everybody that you have named here were escorted out by the guard? A. Yes.

Q. When did you next see or talk with Mr. Leo Bash after that?

A. He called me the next evening.

Q. Where was this call made?

A. To my home.

Q. And do you know about what time it was?

A. I am not too sure about the time; it was late in the evening.

Q. Would this be the evening of January 22nd?

A. Yes, sir.

Q. The same day on which you were discharged?

A. Yes, sir.

Q. How do you know that it was Leo Bash that telephoned you on that occasion?

A. He said, "This is Leo."

Q. And what was the conversation you had with him then? [520]

A. Well, he said, he wanted to know if there was anything personal in what happened, he wanted to know if we were still friends, and I said, "Yes,"

(Testimony of Virginia Kelso.)

we were, there was nothing personal in it as far as I was concerned.

Q. And what else did he say?

A. He said, "You know, Ginny," he says, "The company wants that union out of there."

He said, "They are starting with guys like Chuck Jones and Bruce Risley, and," he says, "They will go on down the line, until——"

Q. They are going on down the line until——

A. He said they are going on down the line.

Q. Was there any more between the two of you in that conversation?

A. Yes. He said, he says, "I am chief operator and——" he says, "I am going to run this office the way I want to, and——" he says, "These commies aren't going to tell me how."

Q. Did you say anything to him during the course of this telephone conversation?

A. No, I didn't get a chance to.

Q. Other than what you have just related?

A. Yes.

Trial Examiner Ruckel: What do you mean "you didn't get a chance to?"

The Witness: He talks too fast. [521]

Cross-Examination

By Mr. Ernst:

Q. How long did Leo talk to you that evening of January 22nd, that is the last conversation that you referred to? A. Not very long.

Q. It was not one of those 40 minute things?

A. No, it was not. It was very short. [522]

(Testimony of Virginia Kelso.)

Q. Now, did he ask you to come back to work?

A. No, he didn't.

Q. He on the night before, though, very definitely wanted to be assured that you were going to come to work, didn't he? A. That is right.

Q. Did that appear to be the purpose of his call on the night before?

Mr. Brotsky: Just a moment.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): Did Leo explain at all in detail to you on the 21st, that is the evening of the union meeting?

A. No, he didn't explain anything.

Q. He didn't give you any detail as to what the trouble had been down there? A. No.

Q. Did he indicate at that time that any union activity had been the reason for the discharge of the 4 to mid watch? A. On that first conversation?

Q. Yes.

A. No, he didn't say anything at all.

Q. Now, you attended the meeting at 7.30 or 8 o'clock? A. 8 p.m.

Q. 8 p.m.? A. Yes.

Q. And at that time were you advised as to what had [523] occurred between 4:15 and 5:30?

A. Yes, they told me.

Q. And who gave you that advice?

A. Well, I don't remember. Everybody was talking about it.

Q. Were most of the people who had been on the

(Testimony of Virginia Kelso.)

4 to mid shift, and who had been involved in the conversation with Leo Bash, present at the 8 o'clock meeting?

A. I honestly don't remember who was there.

Q. Well, maybe I can get at the general point.

Did it seem that most of the people from the 4 to mid watch who were ACA members were present at the meeting?

A. I think most of them [524] were.

* * *

DAVID E. SHEAFFER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: Your name, please?

The Witness: David Sheaffer.

The Reporter: Spell your last name, please?

The Witness: S-h-e-a-f-f-e-r.

Q. (By Mr. Berke): Where do you live, Mr. Sheaffer?

A. 1475 Guerrero Street, San Francisco.

Q. Were you ever employed by Globe Wireless?

A. I was.

Q. When were you first hired by that company?

A. The early part of October, 1946.

Q. And when did you last work there?

A. January 22, 1949.

Q. What job did you hold on January 22nd?

A. APO; I was automatic printer operator.

* * *

(Testimony of David E. Sheaffer.)

Q. What watch were you working in January, 1949? A. Mid watch.

Q. That is mid to 8 a.m.?

A. That is right.

Q. When you first went to work for Globe were you a member of any union? A. No.

Q. And did you later become a member of the union? A. I did.

Q. What union? A. ACA. [529]

* * *

Q. Were you a member of any committee, or did you hold an office in the union?

A. I was a member of the Shop Committee, and I also collected dues in the mid watch after the check-off was no longer in effect.

Q. Do you recall January 21st, 1949?

A. I recall January 21, 1949.

Q. How do you happen to recall that particular night or date, rather?

A. The date Charles Jones was discharged from Globe Wireless.

Q. Where did you learn about Mr. Jones' discharge? A. The union office.

Q. What were you doing at the union office at the time?

A. I came downtown early that afternoon between 12 and 1:30 p.m. I was so informed right there.

Q. Was this at a meeting?

A. This was not at a meeting.

(Testimony of David E. Sheaffer.)

Q. This was preceding the meeting?

A. Yes, there had been a meeting scheduled. There had been two meetings scheduled, I should say.

Q. For later?

A. Yes, later, one at 1:30, I believe, and one at 8 p.m. [530]

Q. Did you attend the union meeting?

A. I attended the 8 o'clock meeting.

Q. Now, did you report on the midnight watch that night? A. I did.

* * *

Q. Did anything unusual occur that night while you were [531] working?

A. 12:15, approximately at 12:15, Mr. Hinde and Mr. Parks appeared in the office.

Q. And where did you see them go?

A. They went up forward to the supervisor's desk in the forepart of the room.

Q. Did you later join them?

A. I joined them immediately.

Q. Were there any others on the mid watch that joined? A. The entire mid watch joined them.

Q. Was Lorraine Conger there? A. Yes.

Q. John Gyuresik? A. Yes.

Mr. Ernst: Isn't this repetition?

Trial Examiner Ruckel: May it be stipulated they were there?

Mr. Ernst: It is in there.

(Testimony of David E. Sheaffer.)

Trial Examiner Ruckel: The record shows they were there.

Mr. Berke: I would rather have it in the record again.

Q. (By Mr. Berke): Virginia Kelso?

A. Yes.

Q. Violet Leach? A. Yes.

Q. Homer Mulligan? [532] A. Yes.

Q. Louis Pena? A. Yes.

Q. George Rosengren? A. Yes.

Q. David Sheaffer? A. Yes.

Q. You, of course? A. Yes.

Q. What was your purpose in going up to Mr. Bash's desk?

A. I wanted to protest the discharge of Charles Jones and the former employees of Globe who had been discharged, I imagine around 4:15 or 5:00 of the day before.

Mr. Ernst: May I strike out his imagination.

Trial Examiner Ruckel: Well, the record shows.

Q. (By Mr. Berke): Did you say anything to Mr. Bash?

A. At one time or another, I did. Mr. Bash had asked a question and I don't remember what it was. I had said, "That means the end of Globe Wireless."

Q. Do you know what the question was?

A. I am sorry. I don't know what the question was. [533]

* * *

(Testimony of David E. Sheaffer.)

Q. (By Mr. Berke): Did Bash make any comments to the group while you were assembled there?

A. Yes, he did.

Q. What did he say? [534]

A. One part of his conversation ran: "The company has been expecting this for the past six months and the General has told me to fire the entire bunch, if necessary."

Q. What else did he say?

A. He also made the statement that we had hitched ourselves to a Communist kite and may sink with it. He also accused us of causing a sit-down strike.

* * *

Q. (By Mr. Berke): About how long was the group assembled around Bash's desk?

A. Approximately one hour.

Q. What happened at the end of the hour? [535]

A. Mr. Bash went over to the time cards and took our time cards out of the rack, placed a rubber band around them, and made the statement he would not go through the formality of punching us out, as we knew that we were fired already. He then disappeared from the room and returned with a building guard.

Q. What happened then?

A. He instructed the building guard to "show these people out."

Q. The guard escorted you out?

A. The guard escorted us out. [536]

* * *

LILLIE I. FRIEND

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: Your name, please.

The Witness: Lillie I. Friend, F-r-i-e-n-d.

By Mr. Berke:

Q. Is it Miss or Mrs. Friend?

A. Mrs.; just Mrs.

A. Mrs. only. My husband and I are friends no longer; we haven't been for years.

Q. I was not concerned with that, I just wanted to be sure that I was calling you by the proper name.

Did you give the reporter your address?

A. 1299 O'Farrell Street, San Francisco.

Q. Mrs. Friend, were you ever employed by Globe Wireless? A. I was.

Q. When were you first employed there?

A. October the 9th, 1946.

Q. And what was your last date of employment?

A. January 24, 1949, of this year.

Q. What position did you hold in January, 1949?

A. I was teletype operator, service clerk. I had various positions in the jobs in the teletype department, including UPAC messages for delivery to the San Francisco area.

Q. What watch did you work on?

A. 8:00 to 4:00 was my general watch for the

(Testimony of Lillie I. Friend.)

last 6 or 8 months. Prior to that I worked from 7:00 until 3:00 most of the time.

* * *

Q. (By Mr. Berke): Were you a member of any union before you went to work for Globe?

A. Yes, I was, I had been a member of a union.

Q. Were you a member of the ACA before you went to work for Globe? A. I was years ago.

Q. And did you join the ACA, or continue your membership in that organization when you were employed by Globe?

A. I did, but my condition of employment by Mr. Albertson, who hired me, told me that he would hire me, but I would have [547] to go to the union hall first and get my clearance card, which I did.

Q. All right.

A. This was October 8th or October 9th I started to work.

Q. All right, you have answered.

* * *

Q. (By Mr. Berke): Do you recall a conversation with Mr. Bash in the latter part of August of 1948? A. Yes, sir. [548]

* * *

Q. (By Mr. Berke): Where did this conversation take place?

A. In the operating room in my department. Mr. Bash was sitting there in his department talking to me.

(Testimony of Lillie I. Friend.)

Q. All right, what did he say to you as near as you can remember, his words?

A. It was a day or two after I came back from my vacation, it was during the incident of the bulletin board, the union bulletin board, concerning the incident of the union bulletin board.

Q. Wait a minute, Mrs. Friend. Just answer my questions, please. Listen carefully.

What did he say to you? A. He said——

Trial Examiner Ruckel: What did he say and what did you say?

The Witness: He said "Lillie, I want you to contact all your ACA members here and advise them that there are to be no longer any union activities in this office, or on the premises, [549] that the company is out to fire the ACA and they would be prepared to move in with a full crew if we did not stop our union activities, that would be regardless of our union—of our seniority, based on the seniority basis, regardless of our seniority. And he said that "This isn't my orders, but it is the orders from the brass hats, the powers that be, inside," he said that "Foye Hayden and Madeline Bruce are out to cut our throats, they want to get rid of the union." He says, "You were not—of course, you can't go out and beat them over the head like they do to them on the waterfront, but,—" he says, "Nevertheless, they are out to do everything they can to get you." And he says, "They are making, different ones are making reports on different watches of what your

(Testimony of Lillie I. Friend.)

activities are, and so—" he says, "I want you to see now that you go around and tell everyone of your members to cut out these union activities while on the job."

Q. (By Mr. Berke): Did you see any of the employees who were members of the ACA and give them Mr. Parks' instructions—excuse me—Mr. Bash's instructions?

A. I did. And Mr. Bash went over and sat at his desk at the end of the room and he watched me, and I went over to Mr. Parks first, and I gave him that information, and Mr. Parks told me "Well, Mr. Bash already told the committee that." [550]

* * *

Q. Now, do you recall June 23—strike that—January 23, 1949? [552]

A. January 23rd?

Q. Yes? Did you receive a telephone call from Mr. Bash? A. Yes.

Q. That day? A. Yes, sir.

Q. About what time?

A. It was somewhere around 8:00 o'clock in the evening.

Q. And where were you when you got the call?

A. I was in my home, the phone rang.

Q. How do you know that it was Mr. Bash who was calling?

A. Because I recognized his voice, and he says, "This is Leo." He asked, "Is that Lillie?" I said, "Yes." He said, "This is Leo," I said, "Yes."

Q. All right, will you tell us the conversation you had with him on the telephone?

(Testimony of Lillie I. Friend.)

A. He says, "I want to inform you of your status on your job." I says, "Yes."

He says, "The day watch is not involved in these firings, but the 4:00 p.m. watch and the mid watch are fired, and they will not be reinstated.

I says, "Yes," like that.

And he says, "Now, your job is here, and I want you to know, and I want you to come down, I want to be sure you are coming down tomorrow morning to go to work." And I said, "Yes."

And then he says, "Of course," he says, "Your work is A [553] No. 1 since a little incident we had in the past."

And he says, "You are an old woman—an older woman now, jobs are hard to get and," he says, "believe me," he says, "I am your friend, Barlow is not."

Q. Who?

A. Mr. Bash said, "Believe me, I am your friend, Barlow is not."

Q. Who is Barlow?

A. He was the Secretary of the ACA then, he was in the shop.

Q. All right, go ahead with the conversation.

A. So I says, "Yes, Leo." And he says, "Are you going to come down, be down?"

I said, "Yes, I will be down," and that was practically the conversation we had.

Q. All right. Did you go down to work then the next morning at 8:00 a.m.?

A. I did, I went in.

(Testimony of Lillie I. Friend.)

Q. Where did you go?

A. I went up to the operating room the way I always do when I go into work.

Q. Now, as you were entering the building did you meet anyone? A. Yes.

Q. Whom did you meet?

A. Paul Guerrero and Les Wheeler went in with me. [554]

Q. Did the three of you then continue on into the building?

A. We did. We first went, the three of us went to the time clock cards to get our time cards.

Q. What did you find when you got there?

A. My time card was not there, neither was Les Wheeler's, but Paul Guerrero's was, and Paul Guerrero stamped his in.

Q. When you found that your card was not there what did you do?

A. Well, I looked over to the room, to Leo Bash's desk, because I could see his desk from when you enter the room, and he was getting up from his desk, and Mr. McPherson was behind him, and Leo Bash came over towards us in very angry mood.

Q. What did he say?

A. He pointed his finger, shook his finger, and went up to Paul Guerrero first, and he said, "Paul, you are fired," and Paul says, "Why?" He says, "You didn't bring your doctor's certificate."

Paul says, "Well, I phoned in I was sick and I couldn't come in."

(Testimony of Lillie I. Friend.)

He says, "Nevertheless," he says, "you cannot go to work unless you have your doctor's certificate."

Paul Guerrero says, "I haven't got it." Then there was words ensued, then Leo—Les Wheeler, he was there—and then he turned to Les Wheeler and talked to him, but I don't recall just what he said to Les Wheeler. [555]

Q. All right. Did he say anything to you?

A. Yes, during the conversation he looked at me. He said "Lillie, your job is there, you get back and go to work."

And I says, "Well, Leo, can I ask you something?"

He says, "Yes."

I says, "How do you expect me to believe that you are my friend when I see all of my friends are fired and out on the picket line?" And he got angry at me, and he went on to say something, and then I said to him, "Well, Leo, can I ask you something else?" And he says, "Yes."

So I referred to our conversation we used to have about the Bible. And I says, "You are talking about Christianity!" Then and there I raised my voice, because he was getting, starting to raise his voice too. I says, "Yes, Leo, I do believe in Christianity, but I don't see any Christianity being practiced here." And then he says, "I swear by God——" and he was trying to justify himself, in words to the

(Testimony of Lillie I. Friend.)

effect that his—that he was right, and he was justified in firing Chuck Jones.

Q. All right, then what did you do or say?

A. Well, I couldn't think what to say. He started, he turned to Les Wheeler and started talking to Les Wheeler and Paul, the three of us were kind of talking. Sometimes I would say something, sometimes he would say something. I don't remember all the conversation.

Q. What next happened that you remember? [556]

A. Well, he told the boys they were fired, both Paul and Les Wheeler, and they started about—they were about half way to the door, and then he turned to me and he said in a very rough way, I have never been talked to like that by a Chief Operator wherever I worked, or any boss, in a manner demanding me to go back to work. There was no one in the teletype department, I couldn't go to work because they were all fired. So I was trying to think what to say, and then he pointed to the door, he said, "Well, trot along then." So I followed Paul Guerrero and Les Wheeler. They turned around and saw that I was coming, so they waited for me, and I went out the door.

Q. Did you serve on the picket line afterward?

A. I did.

Q. Were you ever asked to return to work?

A. No, not after I was fired.

Q. Did you get your final pay check?

A. I did.

(Testimony of Lillie I. Friend.)

Mr. Brotsky: I believe counsel stipulated that all the persons——

Mr. Berke: Named in the Complaint received a termination notice.

Mr. Ernst: Yes.

Mr. Berke: O.K., fine. I have no further questions.

Trial Examiner Ruckel: Cross-examine. [557]

Mr. Ernst: I stipulated they were sent them, not that they received them.

Mr. Berke: All right, we will accept that.

* * *

Cross-Examination

By Mr. Ernst:

Q. Mrs. Friend, I gather that Leo's statement to you sort of left you speechless that morning?

A. Right!

Mr. Berke: Now, just a moment. O.K., withdraw the objection.

Trial Examiner Ruckel: Go ahead.

Q. (By Mr. Ernst): Did Leo seem to be himself that morning?

A. Beg your pardon?

Q. Did Leo seem to be himself that morning or—— A. No, he did not.

Q. Was he frightfully excited?

A. He was very much so.

Q. And at the time that you talked to him at 8:00 p.m. the other night, or the night before, was it?

(Testimony of Lillie I. Friend.)

A. That was Sunday night before I came to work there Monday morning.

Q. At that time he made it clear to you, didn't he, that your job was there, and that he wanted you to come there? You had no misunderstanding as to that? [558]

A. I had no misunderstanding, and I went down in good faith to go to work the next morning. [559]

* * *

Q. Who usually tells you what to do in the teletype department?

A. The day supervisor, or Mr. Argabright, he was day, serving [560] as day supervisor, and Mr. Bash, of course, was the Chief Operator.

Q. Either one of those would tell you what to do?

A. That is right. [561]

* * *

Q. Now, as I understand it, when Leo Bash was talking to you that morning he said things which you have described here as trying to justify himself in firing Chuck Jones?

A. Yes. He said, "I swear by God——" and he referred in a way that he was just trying to justify himself for this act of firing Chuck Jones, but the exact words, I don't recall what he said. [562]

* * *

LESLIE T. WHEELER

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berke:

Q. Will you please give the reporter your full name and address?

A. Leslie T. Wheeler, 2763 Bush Street, San Francisco.

Q. Mr. Wheeler, were you ever employed by Globe Wireless? A. Yes, I was.

Q. When were you hired by that company?

A. October 13, 1947.

Q. And when were you last employed there?

A. January 21, 1949.

Q. What job did you have in January of 1949 with that company? A. Teletype operator.

Q. Now, when you first went to work at Globe, were you a member of any union?

A. That is right.

Q. You were? [565]

A. Yes. When I started to work for Globe, I joined the union.

Q. You joined when you commenced working?

A. That is right.

Q. What union did you join?

A. American Communications Association. [566]

(Testimony of Leslie T. Wheeler.)

Q. Did you write up any minutes of the shop committee meetings after the committee had met with management? [567]

A. Yes, I did.

Q. And what did you do with those minutes after you had written them up?

A. I posted them on the ACA bulletin board.

Q. Did you take notes or minutes while the committee was meeting with management?

A. Yes, I did.

Q. Who were some of the management representatives that you met?

A. General Boatwright, Mr. Brown, the Vice-President, Mr. McPherson, the District Manager, Mr. McCormick.

Q. Who is Mr. McCormick?

A. I don't know what position he holds. I just saw him around there.

Q. In the Executive Officers?

A. Well, he worked across the hall in the offices. Just what his job is, I don't know. And, let's see. That is all I can think of right now. [568]

* * *

Q. (By Mr. Berke): Now, do you remember an incident concerning the bulletin board that the union had in the shop? A. Yes, I do. [569]

Q. When did that incident take place?

A. It was on the day watch and the Chief Operator ordered the bulletin board to be taken down.

Q. Can you tell us about when that was?

A. It was, well, the very next day after the contract expired or one or two days, very close.

(Testimony of Leslie T. Wheeler.)

Q. That is, after August 15, 1948?

A. Yes.

Q. Go ahead.

A. And it was on the day watch and I happened to be the shop steward on the day shift at that time, so I went over to Mr. Bash and asked him why the bulletin board was being taken down, and he said, "Since the contract expired, there is no more union here and you don't need an ACA Union bulletin board."

So I proceeded to talk to him some more about it. I said, "We do need a bulletin board to disseminate information correctly to the employees."

And he said, "Well, if you get together with the employees and meet with management as a group of employees but not as a union, you probably can get the bulletin board back."

So I started a petition circulating for the bulletin board to be put back up and we also went and met with management the next day about it.

Q. Were you one of those that met with management about it? A. Yes. [570]

Q. And did you subsequently have the bulletin board restored? A. Yes, we did.

Q. Do you recall the Sunday preceding the day of your discharge?

A. The Sunday preceding? Yes, I do, yes.

Q. Did you get a telephone call on that day?

A. Yes, I did.

Q. Who did you get the call from?

A. Leo Bash.

(Testimony of Leslie T. Wheeler.)

Q. How do you know it was Leo Bash that was telephoning? A. He identified himself.

Q. What did he say?

A. He said, "Les, this is Leo Bash."

He said, "The gang went on sit down strike down here and I fired them all."

"So," he said, "they have been fired, so they will get two weeks pay in lieu of notice."

He said, "You were off duty and you weren't involved, so you won't get the two weeks' pay."

Q. Did he say anything more that you recall?

A. He said, "No hard feelings."

And I said, "O.K., Leo," and I hung up.

Q. Is that all you recall of the conversation?

A. That is about it, I guess.

Q. If you don't recall, you can say so. [571]

A. I don't remember anything else.

Q. Have you exhausted your memory on that?

A. He fired me. That is about all.

Q. That is all you remember? Does it refresh your memory if I tell you that there was some reference to two strikes on you?

* * *

Q. (By Mr. Berke): What did he say about that?

A. He said, "You have two strikes against you anyhow, because of your race."

Trial Examiner Ruckel: Because of what?

The Witness: Because of your race.

Q. (By Mr. Berke): Now, is that all the conversation?

(Testimony of Leslie T. Wheeler.)

A. Yes. He just said, "No hard feelings," and hung up.

Q. What time were you due to report for work?

A. Midnight that Sunday night.

Q. Before you received the telephone call from Leo Bash, had you planned to go to work at midnight?

A. Yes. I had even made my lunch.

Q. You had made your lunch preparatory to taking it to work with you?

A. Yes. [572]

Q. And did you go?

A. No, I didn't.

* * *

Q. (By Mr. Berke): Why didn't you go?

A. Because after what happened, I knew that I was fired.

Q. Did you go in to see Mr. Bash at any time after that?

A. Yes, I went in on Monday morning on my own time.

Q. At what time?

A. 8:00 o'clock.

Q. And where did you go at that hour?

A. I walked in the door and looked to see if my time card was there and it wasn't there, and I went in the cloak room with a couple of other kids and Leo Bash came over and he started raving like a madman and said that I was fired again because I didn't show up for work last night.

Q. Who were some of the others with you?

A. Paul Guerrero and Lillie Friend.

Q. Did you meet them in the cloak room or had you met them elsewhere?

(Testimony of Leslie T. Wheeler.)

A. No, they were coming up the same time I was.

A. And you walked in the door together? [573]

A. That is right.

Q. Tell us what transpired in the cloak room?

A. Leo came in and started raving. He fired Paul Guerrero, because Paul Guerrero didn't—

* * *

The Witness: He told Paul Guerrero he was fired because he didn't bring in a medical certificate for being sick, and he told me I was fired because I didn't show up for work last night.

Trial Examiner Ruckel: The last night being Sunday night?

The Witness: Sunday night.

Trial Examiner Ruckel: Were you supposed to work on Sunday night?

The Witness: Yes, I was. And he also fired Lillie Friend.

Mr. Ernst: I object to that and ask that it be stricken.

Q. (By Mr. Berke): What did he say to Mrs. Friend, as near as you can recall?

A. If I remember correctly, he said, "Your job is waiting for you, Lillie."

And Lillie said, "Well, Leo, how do you expect me to go to work with my friends being fired."

And as soon as she started protesting their being fired [574] he fired her, too.

Mr. Ernst: I again ask that it be stricken and that he say what Bash said after Lillie Friend got through speaking, if he said anything.

(Testimony of Leslie T. Wheeler.)

Trial Examiner Ruckel: Use his words as near as you can; after she finished speaking, Leo said what?

The Witness: "You go outside and try and make me reinstate Chuck Jones, Bruce Risley, and company." That is about as near as I can remember.

Q. (By Mr. Berke): You are now quoting Bash? A. Yes.

Q. I show you a document marked General Counsel's Exhibit 13 for identification and ask you if you have seen that before and tell us what it is.

A. Yes, I have. This is a telegram Mr. McPherson sent me after I was fired.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Mr. Ernst: That is what I have been looking for all this time. Why didn't you tell me you had it?

Mr. Berke: Why didn't you ask?

Q. (By Mr. Berke): Where did you get this telegram?

A. On the picket line Monday afternoon.

Q. How did you get it on the picket line?

A. A messenger handed it to me. [575]

Q. Who was the messenger, do you know?

A. He is a stock clerk at Globe Wireless.

Q. Do you know about what time it was on the picket line on Monday?

A. About 2 or 3 o'clock in the afternoon.

Mr. Ernst: Has the witness seen this document?

(Testimony of Leslie T. Wheeler.)

Mr. Berke: I showed it to him. He said yes, while you were hunting for it.

Mr. Ernst: No, I stopped hunting as soon as you produced it.

Q. (By Mr. Berke): Did you respond to this telegram? A. No, I didn't.

Q. Have you been back to work since?

A. No, I haven't. [576]

* * *

GENERAL COUNSEL'S EXHIBIT No. 13

Western Union

[Telegram]

1949 Jan 24 PM 12:30

SFA156 PD-San Francisco Calif 24 1156A

Leslie Wheeler

2763 Bush Street APD D

The Chief Operator Advises Me He Discharged You Today After You Came Through the Picket Line to Report to Work. Under the Circumstances I Would Like to Review Your Discharge With You and Return You to Work If There Was Not Sufficient Cause for the Discharge. Will You Telephone Me to Arrange for a Meeting Today or Tomorrow Is Preferred.

J. B. McPHERSON,
Globe Wireless Ltd.

Received July 28, 1949.

(Testimony of Leslie T. Wheeler.)

Mr. Brotsky: Excuse me just one minute.

Q. (By Mr. Brotsky): You were handed a telegram while you were doing what?

A. Picket duty.

Q. In front of the company?

A. That is right.

Mr. Ernst: I won't bother to move to strike. It is completely immaterial.

Cross-Examination

By Mr. Ernst:

Q. Mr. Wheeler, shortly after you had this discussion with Mr. Bash in August with respect to the bulletin board, did you and the other members of the shop committee take that matter up with Mr. McPherson?

A. Yes, we did. [578]

* * *

RESPONDENT'S EXHIBIT No. 11

Agreement

Agreement made this 15th day of August, 1947, by and between Globe Wireless Ltd., a Nevada corporation, hereinafter referred to as the "Company," and the American Communications Association, C.I.O., hereinafter referred to as the "Union."

Witnesseth

General Provisions

1.1 Union Recognition.

The Company agrees to, and hereby does, recognize the Union as the sole collective bargaining

(Testimony of Leslie T. Wheeler.)

agent in all matters pertaining to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company in the continental United States and Hawaii, but excluding executives, confidential employees, and department heads engaged in a purely supervisory capacity with power to hire and discharge.

1.2 Rights of Members.

The Company agrees that all employees of the Company covered by this Agreement shall be members of the Union in good standing, and each such employee who is not now a member of the Union shall make application for membership therein, but no employee on the payroll as of the date of signing of this Agreement who is not now a member of the Union shall be discharged by the Company for non-membership therein where he applies for membership in the Union and is not admitted to membership.

Whether a member is in good standing shall be determined by the Union.

1.3 Bulletin Boards.

The Company agrees that the Union may install and maintain a bulletin board in each office of the Company in a place accessible to employees. Such bulletin board shall be placed so that employees may easily read notices posted thereon. The Company assumes no responsibility for notices appearing on such bulletin boards.

(Testimony of Leslie T. Wheeler.)

1.4 Non-discrimination.

The Company agrees that it will not discriminate against any employee because of any work in, or affiliation with, the Union or other Union activity. The Union agrees that there shall be no Union activities on Company operating premises, except for the collection of dues, and no Union activity of any type on Company time. No collection of dues shall be made on Company property by an employee of any other Company.

The Company agrees that there shall be no discrimination between male and female employees. The principle of equal opportunity and equal pay shall prevail.

1.5 Recognition of Union Officers and Representatives.

The Company shall recognize and deal with only the following officers:

International Officers

International Representatives

Local Secretaries

Shop Stewards

on matters pertaining to wages, hours and working conditions in the administration of this Agreement. Provided, however, that an employee having a grievance may first attempt to adjust the matter with his immediate supervisory Company superior. (See 1.7 (1)).

(Testimony of Leslie T. Wheeler.)

The Union shall notify the Company of the names of the above officers and of any changes.

* * *

1.10 Work Stoppages.

There shall be no lockouts, strikes, slow-downs, sit-downs, walkouts or stoppages of work for any reason during the life of this Agreement.

The Union agrees that none of its members employed by the Company will participate in or aid in the accomplishment of anything which might in any way impede the carrying on of operations and the normal functioning of the Company.

* * *

1.12 Governmental Directives.

All employees covered by this Agreement shall comply with all present and future orders of the Federal Communications Commission.

* * *

1.15 Hiring.

1. Whenever a vacancy occurs in any classification covered by this Agreement the Company shall request the Union to fill such vacancy, informing the Union as to the classification in which such vacancy exists, and the probable length of employment. The Union agrees to furnish the Company with acceptable personnel competent and qualified in the judgment of the Company to perform the work required. In the event the Union is unable to furnish the Company with such personnel within three (3) days of

(Testimony of Leslie T. Wheeler.)

the time Company has made request to the Union, then the Company shall be free to fill such vacancy from any source, provided that if the Company fills the vacancy from a source, other than the Union, the Union shall be notified within three (3) days.

2. The definitions and qualifications in the Classifications and Wages section of this Agreement shall determine qualifications of applicants for employment.

3. The Company shall not be compelled to re-employ any employee who has been discharged for cause and whose discharge was not challenged in accordance with Section 1.19 Discharge of Employees.

* * *

1.19 Discharge of Employees.

In the event of the discharge of any permanent employee who is covered by this agreement, the Company shall give two weeks notice in writing to both the employee and the Union. In the event such an employee is not given two weeks notice of his intended discharge, he shall receive two weeks pay in lieu thereof and the Union shall be so notified. Whenever an employee is discharged by the Company or has been served with notice of intended discharge, the Union may initiate with the Company discussion of the matter of the discharge of any such employee at any time within two (2) weeks after written notice of discharge has been sent to the Union. In the event the Union asks reinstatement

(Testimony of Leslie T. Wheeler.)

of such discharged employee and such reinstatement is refused by the Company, the Union, in its discretion, may ask for arbitration which shall be held in the manner hereinafter provided. The arbitrator shall have power to direct that an employee who has been discharged shall be reinstated with or without loss of pay or seniority.

* * *

1.38 Check-off.

The Company agrees to deduct from the paycheck of each employee covered by this Agreement who is a member of the Union such dues, as may be due the Union and to forward same to the Union once each month, provided such employee has authorized the Company to do so.

* * *

2.4 Automatic Printer Operator.

An employee hired by the Company to operate a radio or landline automatic multiplex or teletype printer. An automatic printer operator may also be required to perform duties of lesser classifications.

Minimum Weekly Wage

Start.....\$47.02

After 6 months ..\$47.62	After 5 years...\$57.31
After 1 year 52.07	After 6 years... 57.66
After 18 months.. 53.91	After 7 years... 58.01
After 2 years ... 55.75	After 8 years... 58.36
After 3 years ... 56.27	After 9 years... 58.71
After 4 years ... 56.79	After 10 years... 59.06

(Testimony of Leslie T. Wheeler.)

2.5 Teletype Printer Operator.

An employee hired by the Company to operate a teletype printer and who may be required to perform clerical duties or other duties in a lower classification.

Minimum Weekly Wage

Start.....	\$40.25	
After 6 months ..	\$42.65	After 5 years...\$51.28
After 1 year	45.18	After 6 years... 51.56
After 18 months..	47.60	After 7 years... 51.84
After 2 years ...	50.02	After 8 years... 52.12
After 3 years ...	50.44	After 9 years... 52.40
After 4 years ...	50.86	After 10 years... 52.68

* * *

Q. (By Mr. Ernst): Now, after that meeting of August 30th, Mr. Wheeler, did you participate in drawing up a report as to what had occurred at the meeting?

A. August 30th? What meeting was that?

Q. I am sorry. I will try to pick up. That is the meeting that had to do with the union bulletin board, the activities of supervisory employees, and maybe one or two other points. Let me show you a copy of it and perhaps that will simplify it.

Mr. Ernst: May I have this marked, please?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 12 for identification.) [582]

Mr. Berke: May we go off the record a moment?

(Testimony of Leslie T. Wheeler.)

Trial Examiner Ruckel: Off the record.

(Discussion off the record.)

Trial Examiner Ruckel: On the record.

Now, your question is what, Mr. Ernst?

Q. (By Mr. Ernst): Do you recall that having been posted on the union bulletin board after that meeting that is referred to in it?

Mr. Brotsky: Just a moment. I thought the question was whether he prepared this particular document after the meeting, and I will object to the previous question.

Mr. Ernst: I believe I got an answer to the previous question and I am now asking a question.

A. I think I do remember this.

Q. (By Mr. Ernst): Do you recall that having been posted on the bulletin board?

A. I think so.

Q. That was on the union bulletin board?

A. Yes.

Q. Were you one of the three people that represented the employees at that particular meeting?

A. Yes, I was.

Q. Did you help draw up the report?

A. This report here?

Q. Yes. [583] A. I don't think so.

Q. This then is not one of the meetings that you took the notes at that you talk about?

A. I don't remember now for sure. I went in to so many of them, it is hard to pin it down.

(Testimony of Leslie T. Wheeler.)

Q. I would like to have you look particularly at the paragraph marked number two then and state whether or not that is your recollection of the union's position with respect to what happened at that meeting?

A. What was your question? What was the question about?

Q. In substance, whether that accurately reports the union's position as to what happened at the meeting? A. Yes.

Mr. Ernst: I will offer it in evidence, Mr. Examiner.

Mr. Berke: Objected to. I don't see that it is relevant. In fact, it is immaterial.

Trial Examiner Ruckel: Let me see it.

Mr. Ernst: The relevancy, Mr. Examiner, is that this shows the taking up of these occurrences by Bash and other so-called supervisory employees up until August 30th in the grievance procedure and the apparent attempt to settle it at that time.

Trial Examiner Ruckel: It may go in.

(The document heretofore marked Respondent's Exhibit No. 12 for identification, was received in evidence.) [584]

(Testimony of Leslie T. Wheeler.)

RESPONDENT'S EXHIBIT No. 4

Union-Management Meeting

November 3, 1948

Present for the Company:

Mr. N. Brown,
Mr. McPherson,
Mr. McCormick.

Present for the Union:

Malcolm Parks, Shop Chairman,
Chuck Jones,
Bruce Risley,
Dave Sheaffer,
Les Wheeler.

The meeting was opened with discussion regarding two people attending who were not elected members of the shop committee. The union contended the above five people were elected by the employees and therefore were the only authorized representatives of the Globe employees. The company said they were "observers." The union agreed that meetings had always been open to observers but made it clear that the faction which the two people at one time supported had been defeated, repudiated and humiliated by a majority vote of the employees in a recent NLRB election. The union regarded these people as "company observers" since they do not represent the employees and were not there at the request of the shop committee.

(Testimony of Leslie T. Wheeler.)

January 8, 1949

(Copy Original Mimeo.)

All Globe Members:

“On December 2nd, 1948, the Shop Committee sent a letter to Mr. Neil Brown requesting that he confirm or deny Mr. McPherson’s interpretation of Mr. Brown’s letter of November 6th, 1948, namely that the Company would not meet with the Shop Committee for the purpose of settling grievances. In its letter, the Committee also pointed out the change in policy of the San Francisco Employers’ Council, the Waterfront Employers’ Association and the Pacific American Shipowners Association with regard to negotiating with the waterfront and maritime unions which have refused to comply with the voluntary provisions of the Taft-Hartley Law, and urged the Company to alter its policy in line with that of the employer associations named, to sit down with the union and negotiate a new contract. The Committee pointed out that this would benefit both Company and employees.

“Having received no reply from Mr. Brown by December 14th, Malcolm Parks, Chairman of the Shop Committee, sent a note to Mr. Brown requesting a reply. On Saturday, December 18th, Brown called Parks requesting an extension of time until Monday, December 20th, to reply to the Committee’s letter. On Monday Mr. Brown called Parks stating that Mr. McPherson was unable to be in the office and that he would have the answer for us on Tuesday afternoon, December 21st. Nothing fur-

(Testimony of Leslie T. Wheeler.)

ther was heard from Mr. Brown or any other official of the Company in this matter until Thursday, December 23rd. On that day, Mr. Brown called the Secretary of the Union, Ed. Barlow, to wish him a merry Christmas and a happy New Year and at the time, expressed the hope that "we will be able to get together soon." The following day, Christmas Eve, Mr. Brown approached several members of the Shop Committee in the operating room with similar greetings, and again expressed himself in such a way that those to whom he spoke were under the impression that the Company would meet with the Committee either the following week or the week following New Years.

The Shop Committee met on Monday, December 27th. In anticipation of a grievance meeting with the Company, the Committee discussed outstanding grievances to be brought up in the meeting with the Company. Brother Parks was given the responsibility of contacting Mr. Brown for a date for the meeting. On Thursday, December 30th, Parks called Mr. Brown to arrange for the meeting and was informed that Mr. Brown would meet with the Committee and that Mr. McPherson had left a note in the operating room for Parks requesting him to meet with Mr. Brown the following day, Friday. On Friday, Parks was informed by Mr. McPherson that Mr. Brown was ill and asked that the meeting be postponed to Monday. On Monday,

(Testimony of Leslie T. Wheeler.)

January 3rd, Parks went in prepared to meet with Mr. Brown but was informed that he was still ill. However, Mr. McPherson stated that he was prepared to go ahead with the meeting, that he had talked to Mr. Brown on the telephone and was prepared to present the Company's position.

* * *

In the meeting with Parks on January 3rd, the Company confirmed its policy of refusing to meet with the Shop Committee to settle grievances and to meet with the negotiating committee to negotiate a new contract. The Company thus confirms that it is its policy to refuse to cooperate with its employees. The Company has withdrawn all cooperation.

On Tuesday, January 4th, 1949, the Shop Committee met and came to the conclusion that Globe employees had leaned over backward long enough in trying to cooperate with the Company, with the only result being more evidence of bad faith on the Company's part. Therefore, the Committee determined that the only course that could be followed is to put into effect the program adopted by the Globe employees in their meetings of November 23rd, 1948.

The Shop Stewards will contact each member for specific details of the program and how it is to be put into operation. Your utmost cooperation with your Shop Committee now will insure the success of the program. Our aim is to protect our jobs,

(Testimony of Leslie T. Wheeler.)

our wages, our hours and our working conditions.
United we can win.

ACA/GLOBE SHOP
COMMITTEE.

Received July 28, 1949.

Q. (By Mr. Ernst): Now, on the Sunday afternoon or evening of the 23rd, I want to find out first what your schedule of shifts was for your work at that time; in other words, what shifts you worked, which dates? A. You mean in January?

Q. From January 16th, I think, on is when the new watch list went on, isn't that correct?

A. My schedule was from midnight to eight in the morning.

Q. What days of the week?

A. Monday through Friday.

Q. Monday through Friday?

A. Yes. [586]

Q. Now, at what time did Leo Bash call you on Sunday?

A. I would say around 7:30, 8 p.m.

Q. Did he attempt to explain to you what had happened?

A. He said, "The gang went on sit-down strike."

Q. Now, as I recall, he said something about "two strikes against you because of your race," or something of that sort? A. That is right.

Q. Do you recall any similar comment to that

(Testimony of Leslie T. Wheeler.)

having been made by Bash to you, or you to Bash previously? A. No.

Q. Now I would like to have from you a statement as to who said what leading up to this statement about the "two strikes," in other words, what Bash said and what you said, and what Bash said at that time?

A. I picked up the phone, and he said, "Les Wheeler?"

I said, "Yes."

He said, "This is Leo Bash." He said, "The gang went on sit-down strike down here, and I fired them all." He said, "Now they will get two weeks because they got fired." He said, "You won't get two weeks," he said, "You weren't here, you weren't on duty, you weren't involved, so you won't get the two weeks pay but—" he said, "You got two strikes on you anyway."

Q. Wait a minute! He went right on and said——

A. When he finished he said, "No hard feelings," and I [587] hung up.

Q. You didn't say nothing but "okay"?

A. No, I didn't argue.

Q. You didn't say nothing but "Hello?"

A. Yes.

Q. Yes, "this is Les Wheeler," and "okay" at the end of the conversation?

A. That is right. I couldn't get a word in edge-wise with him talking.

(Testimony of Leslie T. Wheeler.)

Q. Now, when you arrived the next morning at eight o'clock why did you go into the office?

A. That was the first chance I had to see Leo. I just talked to him on the phone, I wanted to get this straight about being fired, also to protest the discharge of the rest of the people.

Q. When did you decide that you wanted to protest the discharge of the others?

A. As soon as I could get to see him.

Q. I mean when did you reach the decision in your own mind that you wanted to protest the discharge of the others?

* * *

A. Well, I don't know. I guess I thought it over in my [588] sleep during the night.

Q. (By Mr. Ernst): You mean you slept from midnight to eight when you normally would have gone to work?

A. I didn't work that night.

Q. I mean hadn't you slept already before that?

A. No; I slept in the morning, yes, but I was up at that time of night, so I went to bed.

Q. Now, did you talk to the people on the picket line before you came in that morning?

A. When I went in the picket line hadn't been established.

Q. I see. And, as I understand it, you went from the main door into the cloakroom?

A. That is right.

Q. And did you hang up your hat?

(Testimony of Leslie T. Wheeler.)

A. No.

Q. Were Lillie Friend and Paul Guerrero in there with you? A. Yes.

Q. What did you talk about at that time?

A. Leo did all the talking.

Q. Wait a minute. I mean before Leo arrived?

A. He was there practically right at the same time we got there. We walked in the cloakroom; he came right on over.

Q. You didn't have a chance to talk about anything then before he came in?

A. No, no general conversation, no. [589]

Q. Well, what I want to know is was there any conversation or not among you and Guerrero and Friend prior to the time Bash arrived?

A. If there was I don't remember anything particularly. There might have been, but——

Q. Now, to the best of your recollection, what was the first thing that Leo said? You don't have to use his loud voice.

A. That is impossible! Let me see, I think he said to Lillie Friend, "Your job is waiting for you if you want it."

Q. Yes.

A. And he turned, he turned to Paul and I, and he said to Paul, he said, "Have you got a medical certificate?"

Paul said, "No, I was just sick one day," or something, "I didn't see a doctor, and I don't have a certificate."

(Testimony of Leslie T. Wheeler.)

He said, "You are fired if you don't have a certificate from your doctor."

Q. Did he say or until you get a certificate?

A. I don't remember.

Q. You can't recall that detail?

A. No, he was pretty definite in firing Paul, I remember that.

Q. Now, did he seem surprised to see you there?

A. Well, I don't know whether he was surprised or not. I couldn't say. [590]

Q. But the first thing that he said to you was, "Why didn't you come to work last night"; is that right? What was the first thing he said?

A. He said, "you are fired because you didn't show up for work last night."

He said, "Get out, you are not getting any more money. You don't work here."

Q. Now, that was then everything that you recall as having occurred at that time?

A. Yes, there might have been other things said, but I can't remember them all.

Q. You can't recall anything of any consequence that was said either by Lillie Friend or Paul Guerrero or yourself or Leo Bash?

A. The main thing I remember was Leo firing us because he was doing practically all the talking. Lillie tried to protest the discharge, but he didn't give her much chance, he fired her too as soon as she started to protest the discharge.

Q. Protesting what discharge?

(Testimony of Leslie T. Wheeler.)

A. Chuck's and everybody else that was fired before.

Q. Did you get the chance to make the protest that you wanted to make? A. No.

Q. Now, previous to this time you had dealt with Mr. McPherson, particularly at this August 30th meeting, hadn't you? [591] A. Yes.

Q. And you thought at that meeting that Mr. McPherson would reverse Mr. Bash, or advise you that he was going to change Mr. Bash's position on the subject, didn't he?

A. That is what he said.

* * *

Q. (By Mr. Ernst): Now, had you also heard that Mr. Brown's [592] door was open to the employees? A. Yes, I had heard that.

Q. Now, your purpose of going down there was to, as I understand it, to protest these discharges?

A. Yes, more or less to protest the discharges, and also get clarification on my position.

Q. In other words, you wanted to find out what was up? A. That is right.

Q. And what had given rise to all of these discharges? A. That is right.

Q. And why they had done this to you, and what was wrong down there, is that correct?

A. That is right. [593]

* * *

Q. (By Mr. Ernst): Why didn't you see either Brown or McPherson or General Boatwright about it? [594]

(Testimony of Leslie T. Wheeler.)

A. About—after I got the telegram you mean?

Q. Yes. No, no, this morning?

Trial Examiner Ruckel: After you received the telegram? Isn't that what you mean?

Mr. Ernst: No, I am talking now about the first morning when he came in and he only saw Leo Bash, and he apparently got a very quick brushoff there.

Mr. Brotsky: Just a moment. I will object to that.

Trial Examiner Ruckel: Objection sustained.

Mr. Ernst: All right.

Q. (By Mr. Ernst): Now, after you came in and saw Leo Bash why didn't you bother to see McPherson or somebody higher up?

Mr. Brotsky: Same objection.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Ernst): You did not make any effort to see anyone higher up? A. No.

Mr. Berke: I ask that be stricken.

Trial Examiner Ruckel: That may stand. Let's get ahead. [595]

* * *

Q. In other words, what time did you get the telegram from Mr. McPherson?

A. The first copy I received Monday afternoon about, between two and three on the picket line.

Q. Thereafter you made no effort to see Mr. McPherson or anybody else in the company?

A. No. [596]

* * *

(Testimony of Leslie T. Wheeler.)

Q. Now I will show you Respondent's Exhibit 5 for identification and ask you if that was distributed among the ACA employees of Globe in the early part of January of 1949?

* * *

Mr. Ernst: If it is stipulated that it was distributed among the employees of the ACA committee, fine.

Trial Examiner Ruckel: It is in the record. [601]

* * *

PAUL GUERRERO

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

The Reporter: Your name, please?

The Witness: Paul Guerrero.

By Mr. Berke:

Q. Where do you live, Mr. Guerrero? [604]

A. 1315 Grove.

Q. In what city? A. Pardon?

Q. In what city? A. San Francisco.

Q. Will you please speak up so that we can hear you? Were you ever employed by Globe Wireless?

A. I was.

Q. Talk up.

* * *

(Testimony of Paul Guerrero.)

Q. (By Mr. Berke): When were you first employed by Globe? A. February 26, 1947.

Q. And what was the date of your last employment there?

A. January the 24th, that was on a Monday.

Q. 1949? A. 1949.

Q. What position did you hold in January of 1949 at Globe? A. I was a teletype operator.

Q. Prior to getting employment at Globe were you a member of any union?

A. I was a member of the ACA, CIO.

Q. And did you maintain membership in that organization when you went to work at Globe? [605]

A. I did. [606]

* * *

Q. Do you recall January 21, 1949?

A. Yes; I think it was on a Friday, I think.

Q. Did you attend a union meeting that night?

A. I did.

Q. And at that meeting did you learn of the discharge of Charles Jones? A. That is right.

Q. Did you work that day?

A. No; I was off; my regular days off were Friday and Saturday.

Q. And when was the next day you were due to report to work? A. Sunday morning.

Q. Do you recall the night before the day you were due to report to work?

A. Yes, I was not feeling very good. [608]

Q. What night was that?

A. That was Saturday night.

(Testimony of Paul Guerrero.)

Q. Could that be the 23rd, January 23rd? 22nd, rather?

A. It must have been the 22nd, at night.

Q. Yes. Where were you? A. I was home.

Q. You say you weren't feeling very good?

A. No; there was a lot of flu and colds going around at that time.

Q. Did you have a cold? [609]

* * *

A. I had a cold.

Q. Did you do anything about—strike that.

What did you do that evening while you were home?

A. Well, I had some friend that was staying there, that was at my house. I had him call up and notify the office that I wouldn't be able to report in the morning.

Q. Was this call made in your presence?

A. It was.

Q. And whom did you tell this friend to call?

A. I told him to ask for the supervisor.

Q. And were you there when the call was made?

A. Yes, I was.

Q. Did you hear this friend ask for the supervisor? A. Yes, and a man answered the phone.

Q. How do you know that it was a man that answered the phone?

A. Well, I was close enough to the receiver.

Q. Could you hear the voice over the receiver?

A. Yes, I did.

(Testimony of Paul Guerrero.)

Q. Were you able to recognize whose voice it was? A. Pretty hard off-hand.

Q. You don't know?

A. No, I couldn't swear to it.

Q. All right. What did you hear this friend tell whoever answered the phone?

A. Well, he asked would I be in Monday morning for sure, and [610] he said, "Yes." I told him to say "Yes."

Q. Was that all your friend said?

A. That is all. Well, he told him I would be in Monday.

Q. All right. Did anything happen the next day, Sunday, the day you were supposed to report?

A. Yes, I was in bed, and Leo Bash called me up about ten o'clock in the morning.

Q. How do you know it was Leo Bash that called you? A. No mistake there.

Q. You mean you recognized his voice?

A. Sure; anybody would.

Q. What did Bash say to you?

A. Well, he said, "This is Leo." He told me to come down to work, show up. I told him I was sick.

Q. What did he say to that?

A. He said to show up anyway.

Q. Tell us what the rest of the conversation was in his words and your words as near as you can tell us.

A. He said to show up, "Come down anyway." He told me there was no picket line down there. I said, "Well, hell, I can't help it, I am sick."

(Testimony of Paul Guerrero.)

Q. What did he say to that?

A. Well, he said to show up anyway, to come down, and then he hung up.

Q. Is that all the conversation you remember?

A. Yes, I think that is about all.

Q. That you remember?

A. That I remember.

Q. Have you exhausted your memory on that?

A. Well, he said,—oh, no, he said something else.

Q. What was it?

A. He told me—I overlooked it, I forgot it, but during this conversation about telling me to show up, he was so insistent, I kept telling him I was sick, I was sick in bed. He says, well, he says, “I am not going to stand for none of Barlow’s tricks, you show up, you come down and show yourself.”

I said, “Hell, I can’t help it.”

Q. Who was this Barlow he referred to?

A. The Secretary of the Union.

Trial Examiner Ruckel: Employed by the Company?

The Witness: No, sir, he was the Secretary of the Union, he was not employed by the union—I mean by the company, he was Secretary of the Union.

Q. (By Mr. Berke): Now, in this conversation with you did Bash say anything about why you hadn’t reported being ill, did he bring that up, that he hadn’t got the report about you being ill?

A. No, he didn’t mention it at all. [612]

Q. Did you report to work Monday at the usual hour?

(Testimony of Paul Guerrero.)

A. I reported to work, yes, sir, 8:00 o'clock.

Q. Where did you go?

A. I went up to the card rack to stamp in, and I stamped in.

Q. Did you meet anybody when you went in?

A. Yes, I met Les Wheeler and Lillie Friend.

Q. Where did you meet them?

A. I met them in the cloak room there.

Q. And did you say you went to the time card rack?

A. I did.

Q. Had you previously come up the elevator with Wheeler and Friend?

A. Yes, I did.

Q. Did you find your card in the card rack?

A. Mine was the only one of the three.

Q. What did you do with it?

A. I stamped in.

Q. You say yours was the only one of the three there?

A. Just one of the three, Wheeler's, myself, and Friend—I mean mine was the only card.

Q. And Wheeler's and Friend's were not there?

A. No.

Q. And after you clocked in, what did you do?

A. Well, I went to put my hat away, coat.

Q. Where did you go? [613]

A. I went to my locker. Each had their own individual locker.

Q. And while you were there, did anything happen?

(Testimony of Paul Guerrero.)

A. Oh, yes, just about that time Leo walked in.

Q. That is Leo Bash? A. That is right.

Q. All right. What happened when he came in?

A. He just said, "Have you got a doctor's certificate"?

I said, "No, what for"?

He said, "Well, for yesterday."

I said, "I never had to have a doctor's certificate for being absent one day before."

He never asked me for one before.

Q. What did he say to you?

A. He said, "Well, if you haven't got a doctor's certificate, you are through."

I said, "What do you mean through"?

I said, "Am I fired, dismissed, suspended, or what"?

He said, "Well, you call it. You aren't getting paid."

Q. He said, "You call it. You aren't getting paid"? A. That is right.

Q. Did you hear him talk with Les Wheeler?

A. Yes. I was around. I was still there.

Q. What did you hear him say?

A. I can't recall very well. I can't recollect.

Q. As best as you recall.

A. I don't know. He asked him something about where he was and where he had been or hadn't shown up or something, I don't exactly remember.

Q. Did you hear him talk to Mrs. Friend?

A. Yes. He told her, "Lillie," he said, "you have got your job inside, if you want to work."

(Testimony of Paul Guerrero.)

Q. Did you hear what she said?

A. Well, she started—she said, “I want to talk to you about the rest of the employees being fired.”

He says, “Well, I don’t want to talk to you about it. I can’t talk to you about it.” I don’t know what he said, something about not being able to talk to her about it.

Q. Were you there when he discharged her?

Mr. Ernst: I object.

A. Yes.

Mr. Ernst: I withdraw it.

A. Yes, I was there.

Q. (By Mr. Berke): What did you hear him say in that connection?

A. I can’t quote him. I don’t recall very well.

Q. I show you a document marked General Counsel’s Exhibit 14 for identification, and ask you if you have seen that before and what it is.

(Thereupon the document above referred to was marked General Counsel’s Exhibit No. 14 for identification.) [615]

A. Yes, I received that at home about noon.

Q. (By Mr. Berke): Did you respond to this?

A. No, not immediately.

Q. Did you—go ahead.

A. I answered Mr. McPherson a letter.

Q. Did you get a copy of Exhibit 14 for identification later on?

A. Yes, I got a carbon, the original carbon copy of it.

(Testimony of Paul Guerrero.)

Q. Where were you when you got it?

A. I was out on the picket line somewhere around 2:00 o'clock.

Q. Who brought it out to you?

A. Don McPherson, the stock room clerk.

Q. Is he employed by Globe?

A. Yes, he is. [616]

* * *

GENERAL COUNSEL'S EXHIBIT No. 14

Western Union

[Telegram]

SFA 153 PD-San Francisco, Calif. 24 1156A

Paul Guerrero,

1315 Grove St.

The Chief Operator Advises Me He Discharged You Today After You Came Through the Picket Line to Report to Work. Under the Circumstances I Would Like to Review Your Discharge With You and Return You to Work if There Was Not Sufficient Cause for the Discharge. Will You Telephone Me to Arrange for a Meeting Today or Tomorrow if Preferred.

J. B. McPHERSON,

GLOBE WIRELESS LTD.

Received July 28, 1949.

G. C. 14 (Rec'd)

(Testimony of Paul Guerrero.)

Q. (By Mr. Berke): Now, had you been absent from your work before this particular occasion?

A. Yes, I was absent about a week before that.

Q. For how long? [617]

A. One day.

Q. And what was the reason for your absence then? A. I was sick.

Q. And did Bash ask you on that occasion when you returned for a doctor's certificate?

A. No, he told me over the telephone not to worry about it.

Q. At that time you had talked to him, had you, and notified him personally?

A. Yes. I told him I wouldn't have one and he said not to worry about it.

Q. Were you ever given a booklet of rules pertaining to a doctor's certificate? A. No.

Q. Did you ever see any rules that required you to bring in a doctor's certificate, if you were ill for a day? [618] A. No.

* * *

Cross-Examination

By Mr. Ernst:

Q. Mr. Guerrero, on the day about January 14th or so, if you were sick and didn't come to work and called Mr. Bash and told him about it, did you get paid for that day?

A. Yes, I did, I think. I am pretty sure I did.

Q. Now, I gather that on the night of January 21st, when you had your friend call, the supervisor, that you weren't able to talk yourself?

(Testimony of Paul Guerrero.)

A. I was able to talk all right.

Q. Why didn't you call yourself in?

A. Why didn't I call? I don't know. I guess it was more convenient for my friend to call, I guess.

Q. But you stood by the telephone and told your friend what to say and heard the reply?

A. I was in bed, yes.

Q. What? A. I was in bed.

Q. But you——

A. I didn't want to have to get up from bed and go to the phone.

Q. Where is your telephone in your house?

A. Well, it is in the room. [619]

Q. It is in the same room that your bed is in?

A. That is right.

Q. And how far way from your bed?

A. About a yard, I guess, a couple of yards, getting up.

Mr. Ernest: Now, I would like the record to show that there is a good pause in between my question and my answer with respect to why he had his friend call.

Mr. Berke: What is the purpose?

Mr. Brotsky: The record hasn't shown the numerous pauses made by other witnesses or by yourself in between questions, Mr. Ernst.

Mr. Berke: Especially the prolonged pauses by counsel.

Trial Examiner Ruckel: Counsel is not testifying. The record may show a pause. However, the witness paused between various questions on direct.

(Testimony of Paul Guerrero.)

Mr. Berke: I think the Trial Examiner is the judge of the witness' demeanor.

Mr. Ernst: I would like the Examiner to note that there was a longer pause than usual. [620]

* * *

LEO BASH

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [628]

Direct Examination

By Mr. Ernst:

Q. State your name, please. A. Leo Bash.

Q. And your address?

A. 65 Elm Avenue, Mill Valley, California.

Q. What is your position at this time?

A. Presently a supervisor.

Q. For whom do you work as a supervisor?

A. Globe Wireless, Ltd.

Q. What are your hours?

A. Mid to 8:00 a.m.

Q. How long have you been in your present position? A. About three weeks.

Q. And what was your position prior to that time? A. Chief Operator.

Q. And when did you become formally appointed as a Chief Operator at Globe Wireless?

A. The latter part of September, 1947, I believe. [629]

* * *

(Testimony of Leo Bash.)

Q. During the time of your employment in the industry have you ever been a member of a Union?

A. Yes.

Q. What unions have you belonged to during that time?

A. I have been a member of the ARTA, which later became the ACA, and I have been a member of the IBEW, Local 6.

Q. Now, during what period of time were you a member of the IBEW? A. During the war.

Q. And what was the nature of your employment at that time?

A. I was a leaderman in the shipyard.

Q. What kind of a leaderman?

A. Electrical, maintenance.

Q. Was that radio communications work?

A. No.

Q. When did you join the union that you said was the predecessor [630] of the ACA?

Mr. Berke: How is that material, Mr. Trial Examiner?

Trial Examiner Ruckel: You may answer. Move along.

A. As nearly as I can recall, it was 1932 or 1933, somewhere along in there.

Q. (By Mr. Ernst): And were you involved in the—I withdraw that.

While you were employed and a member of the ACA—withdraw that also.

Were you involved in a strike in the thirties?

A. Yes.

(Testimony of Leo Bash.)

Mr. Berke: Just a moment. I move the answer be stricken.

Trial Examiner Ruckel: Objection sustained.

* * *

Q. (By Mr. Ernst): Now, Mr. Bash, were you a member of the ACA while you were an employee at Globe? A. Oh, yes, all the time.

Q. The whole time up to when?

A. Up to the time I was appointed Chief Operator.

Q. Now what did you do with respect to your membership in [632] ACA at that time?

A. I took a withdrawal card from the union.

Q. Now, what was your position prior to becoming Chief Operator?

A. Point to point operator, and then supervisor.

Q. And while you were supervisor were you a member of the ACA? A. Yes, sir.

Q. And were you at that time required to be a member of the ACA by virtue of the union agreement? A. Yes, sir.

Mr. Brotsky: I didn't hear that answer.

The Witness: Yes.

Trial Examiner Ruckel: Keep your voice up, Mr. Bash. The stenographer doesn't get the nod of your head, just your answer she gets.

Q. (By Mr. Ernst): And were the other supervisors that worked with you at that time required to be members of the ACA?

Mr. Berke: Just a moment. I object to that, it is incompetent, irrelevant and immaterial.

(Testimony of Leo Bash.)

Trial Examiner Ruckel: Objection sustained.

Mr. Ernst: I offer to prove that the supervisors employed by Globe Wireless up to the position of Chief Operator were required by virtue of the ACA-Globe collective bargaining agreement to maintain membership in the ACA in good standing as a condition of employment in accordance with the usual closed shop [633] provision up to August 15, 1948.

Q. (By Mr. Ernst): Now, Mr. Bash, were you yourself present at the general run of grievance committee meetings as a representative of the Company in the course of the handling of grievances under the ACA agreement?

* * *

The Witness: I would have to say "No."

Q. (By Mr. Ernst): Now, Mr. Bash, do you recall the period from about January 20, 1949, until January 24, 1949?

A. Vaguely, but "Yes."

Q. Just vaguely?

A. Well, some things are very clear.

Q. Now, I would like you to start out by telling me what hours [634] you worked during the period beginning with January 20, if you can recall that?

Mr. Berke: Of what year?

Mr. Ernst: 1949.

A. I arrived at the office around 8:40 in the morning, and I would leave the office around 5:15 or 5:30 or a quarter to 6:00 in the evening.

Q. (By Mr. Ernst): Was that your normal

(Testimony of Leo Bash.)

working hours during the period at the beginning of January?

A. That was my normal routine, yes.

Q. Now, during the period up to January 24th did you deviate from those hours in any substantial way?

A. Yes, very much so.

Q. Now, January 20th, is, I believe, a Thursday. Do you recall Thursday of January the 20th?

A. Yes, mainly because it preceded Friday, January 21.

Q. Would you tell me what hours you worked on Friday, January 21st?

A. Yes. I worked from 8:40 in the morning until around noon the next day.

Q. In other words, from about 8:40 on Friday the 21st until about noon on Saturday, the 22nd?

A. That is correct, yes.

Q. Now, what did you do after noon on Saturday?

A. I had my wife and son come over to the city and get me, and [635] I went home and went to bed.

Q. And when did you come back to work?

A. Sunday around noon.

Q. And how long did you continue at work after Sunday around noon?

A. Until Monday around noon, or shortly thereafter. [636]

* * *

Q. (By Mr. Ernst): Now, did you have a subsequent discussion with any of the employees shortly after 4 o'clock that afternoon?

A. Yes, sir.

(Testimony of Leo Bash.)

Q. At 4 o'clock you were on duty as usual, were you? A. Yes, sir.

Q. And did the regular shift come in in the usual fashion? A. Yes, sir.

Q. And did they replace the other group that had been working from 4:00, from 8:00 to 4:00?

A. Yes, they took their positions and made their reliefs. [657]

Q. Now, when a person comes in to make a relief and start his work does he normally get instructions from somebody as to what he has to do?

A. No, not unless there is some change made, they just all naturally go to the position that they have been used to working, or have worked. If there is some question about it they ask the Supervisor, but they all know what to do.

Q. Now, at any time after 4:00 o'clock did some people who were not on the shift come into the operating room? A. Yes.

Q. Who were they?

A. Malcolm Parks and Charles Jones came into the operating room.

Q. Do you recall at what time they came in?

A. I would say it was approximately 4:10, 4:15, somewhere along there.

Q. At that time where were you?

A. I was sitting at my desk in front of the, and slightly to the side, and in front of the control panel.

Q. And did you notice Parks and Jones come in through the door? A. I did.

(Testimony of Leo Bash.)

Q. Would you state what they did between the time they come in through the door and the time, if you did, you started to talk to them?

A. Yes. While I was walking over to where Parks and Jones [658] were, Parks stopped at the corner of the cloak room and kind of leaned up against the door, and gave the people that were on duty then a kind of——

* * *

Q. (By Mr. Ernst): Go ahead and tell what he did, don't characterize it, tell exactly what he did.

A. Well, he stopped and leaned against the corner of the cloak room there by the teletype department, and while he was still there I walked up.

Q. Now, you met Parks and Jones by the cloak room? A. That is right.

Q. At the time you arrived to where Parks and Jones were were there any other people there?

A. Not right at that moment, no.

Q. Did any people subsequently come and join you? A. Yes, sir.

Q. How soon after the time that you and Jones and Parks came together in front of the cloak room did the others come? A. Immediately.

Q. Now I would like to have you relate the beginning of that [659] conversation, telling me who said what, and quoting to the very best of your recollection each person's statements.

A. Well, as near as I can recall the exact words, I asked Malcolm if there was anything I could do

(Testimony of Leo Bash.)

for him, and he says, "Leo, we are going to put Chuck back to work."

Q. Go ahead and tell me what was next said.

Trial Examiner Ruckel: Did he request an explanation for the discharge?

The Witness: Pardon?

Trial Examiner Ruckel: Did he request an explanation for the discharge of Jones?

The Witness: No, sir. He merely said, "We are going to put Chuck back to work."

And by that time the group gathered around me in a semicircle, and Bruce Risley took over as spokesman for the group and started needling me with—

* * *

The Witness: He said, "Leo, you can't get away with this," and he repeated that statement several times.

And I ordered these people, all of them to get back to their circuits and go to work. None of them did.

I recall one girl in particular, Viola Williams,— [660]

* * *

The Witness: I answered her. She didn't want to go back to work. She said, "I will go to work when Chuck goes to work." And essentially that was the answer of them all, they would not go to work until Chuck went to work. And then Bruce, of course, said again, "You can't get away with this, Leo."

(Testimony of Leo Bash.)

And I informed Bruce and the group present that I had not discharged Charles Jones, I suspended him, and that I could not under the circumstances reinstate him, put him back to work. And Bruce Risley said, "Well, who did?" And I says, "Well, General Boatwright did."

Well, he says, "Tell General Boatwright we are here."

I said, "You tell him yourself."

I says, "If you want to go in and see General Boatwright go in and see him, if you want to phone him, phone him, but you are not going to shove me around."

Trial Examiner Ruckel: What was the basis for your statement that General Boatwright had discharged him?

The Witness: Well,— [661]

Trial Examiner Ruckel: Did you merely assume that?

The Witness: I merely assumed that.

Trial Examiner Ruckel: McPherson actually had discharged him?

The Witness: That is right, Mr. McPherson actually had.

And when they wouldn't return to work I went over to the time clock and I very carefully looked at each person in that group, took their time card out of the rack, and stamped their card out one at a time, and went across the hall with them to Mr. McPherson, and I laid them down on his desk, and

(Testimony of Leo Bash.)

says, "These people have come in at 4:00 o'clock to relieve the shift, and now they refuse to work."

He says, "All right, you go back over there, do the best you can." He says, "I will send you anybody I can." And he says, "I will ring you in a little while, or as soon as I can and inform you further."

So I went back over there and helped out in the teletype department and awaited this expected phone call from Mr. McPherson. And when it came it was, of course, him. He said——

Mr. Ernst: Wait a minute.

Q. (By Mr. Ernst): I would like to try to get, if I can, the time of this phone call from Mr. McPherson. Do you have a recollection as to the time?

A. Well, it must have been somewhere around 5:00, or a quarter after. [662]

Q. Now what had you been doing in the interim between the time you talked to Mr. McPherson when you had handed him the time cards and the time you got the telephone call from Mr. McPherson?

A. Well, I had been helping there on the teletype department, taking phone calls, answering tie lines, and so on and so forth.

Q. Did you do work in accepting messages for transmission? A. Yes, sir.

Q. And did you perform the work that you usually performed as Chief Operator?

A. No.

(Testimony of Leo Bash.)

Q. What sort of work were you performing?

A. I was doing the work that my teletype people should have been doing.

Q. Now, did you have conversations with this group that you had talked to before, or you had punched out the cards, during the interim between then and 5:15 when you got the phone call from Mr. McPherson?

A. I believe I walked up to Ted Byer, who was in that group, and asked him personally if he was in the group, or there merely as an observer, and he said, "No," he was not in the group at all, he was there merely as an observer. And then I believe I asked Sylvia Pottle if she was in that group too, and her reply was "Why, yes." And I think I said, "Well, I am amazed! [663] I thought you knew me better than that," or something like that.

Q. Did you notice what the group of people were doing during the interim when you were in the teletype department and doing other things around the office?

A. Just standing there.

Q. Now, do you recall about how long you talked to these people between the time Parks and Jones came into the room and the time you punched out the people?

A. Ten or fifteen minutes, I would say.

Q. Do you know what time you punched them out?

A. No, not exactly, but if the point is important it will certainly show on their time cards.

(Testimony of Leo Bash.)

Q. Now, you said, I think, it was 5:00 or 5:15 you got a telephone call from Mr. McPherson?

A. That is right.

Q. Would you state your conversation with him on the telephone at that time?

A. Yes. He said, "Leo,——"

* * *

The Witness: He said, "Leo, do this——" No, he says, "Come over and I will give you the time cards." [664]

Q. (By Mr. Ernst): Is that the total of the conversation?

A. No, no. I am trying to think and get it straight.

Trial Examiner Ruckel: Well, is it important from the——

The Witness: Well, anyhow he said, "Do this: Ask each one of those persons individually if they would now care to go to work, and if they do so tell them that they can go to work, and those that refuse to do inform them that they are fired." And that is what I did.

* * *

Trial Examiner Ruckel: Had you made any attempt to offer the cards to the employees when you punched them out and before you took them into Mr. McPherson's office and laid them on his desk?

The Witness: No, I didn't, and the card itself is not particularly important.

Trial Examiner Ruckel: I don't mean that. Did

(Testimony of Leo Bash.)

you offer it to them, or show them to the employees?

The Witness: No, from the point the cards are not particularly important. They could have went to work if they had [665] wanted to.

Q. (By Mr. Ernst): Well, now, what did you say to the people in the group after you had these instructions from Mr. McPherson?

* * *

The Witness: I walked up to the group, and I said, "I have been instructed to ask you—" I believe Sylvia was first—"Sylvia, if you would care at this time to return to your job." And I believe that Bruce Risley, where he was standing, was possibly next, and everybody in the group, of course, excepting Charles Jones.

Q. (By Mr. Ernst): You have now told us what you said to Sylvia Pottle. Did she make any reply?

A. She said "No" or shook her head. [666]

Q. (By Mr. Ernst): What did you say to Bruce Risley? A. Essentially the same thing.

Q. Did you say essentially the same thing to each one of the group? A. That is correct.

Q. Now I would like to have your best recollection as to what each one of these people said in reply to your statement?

A. They each one either said they would go to work only when Chuck went to work or they shook their head.

Q. Now, when this exchange of conversation was concluded, what did you do or say?

(Testimony of Leo Bash.)

A. I told them, "I have been instructed to inform all of you that you are fired."

Q. Then what happened?

A. They went out.

* * *

Q. Now, in what way did you spend your time the rest of that [667] day?

A. Well, it was around a quarter after five or twenty after five or something then, and I went over to my desk and got my wife on the telephone and told her if she had supper on, to take it off, that I probably wouldn't be home for several hours, and then I began to wonder what I could do about getting some of those people out of there that were on overtime and tired, get them out of there to go home.

Q. What did you do, is what I want to know, Mr. Bash?

A. Well, I started calling people on the graveyard shift.

Q. You didn't do any more work then after five fifteen yourself of the type of work that the——

A. I might have jumped up and answered the phone or answered a buzzer that was buzzing when somebody couldn't get to it. I might have done that two or three times.

Q. In other words, you did substantially what your usual duties were from then on?

A. That is right.

Q. Now, you said that you then started to tele-

(Testimony of Leo Bash.)

phone the people who were on the graveyard shift. Do you recall who you telephoned?

A. Well, I made several attempts to get practically everybody on the graveyard. Some of them I finally contacted and others I failed to contact.

Q. Now, that evening did you remain at work until after [668] midnight? A. Yes.

Q. And at midnight would you tell me what happened?

A. Well, at midnight the graveyard shift, the usual graveyard crew, came in, punched their time clocks in, sat around a little bit, waiting for midnight, the stroke of midnight, and shortly there before they went around and relieved the people on the various jobs and went to work.

Q. Was this the usual procedure when the shift changed?

A. Yes, that is the usual procedure and that is all there was to it.

Q. What happened to your crew that was on at that time?

A. They stamped out and went home.

Q. Now, did you go home immediately at that time or did you remain at work?

A. I was preparing to go home.

Q. Did anybody come into the office then who wasn't on duty at that time?

A. Yes, Malcolm Parks and Al Hinde.

Q. What time did they come in?

A. Around a quarter after twelve, possibly 12:20. I didn't notice exactly.

(Testimony of Leo Bash.)

Q. And where were you at that time?

A. Sitting at my desk.

Q. What did you do when you saw them come in? [669]

A. Just waited there at my desk until they came up.

Q. And did they come up to your desk alone?

A. No. Everybody raised right up and came up.

Q. And who opened the conversation?

A. Mr. Parks.

Q. Will you state what Mr. Parks said?

A. He said, "Leo, we want Chuck reinstated."

Q. What did you say?

A. I again stated that I had not discharged Charles Jones, that I had suspended him and that is all that I had done, that is all that my authority allowed me to do, that I couldn't under any circumstances reinstate Charles Jones, even if I wanted to, and that I considered it very stupid to come down here and put the pressure on me under the circumstances when they should know that I certainly can't do anything about it.

Q. What was next said?

A. Well, he just gave a wave of his arm and he said, "Well, I guess we can't do anything about it."

Trial Examiner Ruckel: Who was this?

The Witness: Parks. He and Al Hinde just stood there behind me and the rest of the people just made themselves comfortable in the supervisor's seat and the other chairs that were around

(Testimony of Leo Bash.)

there. Then after three or four minutes, I said, "Well"— [670]

Q. (By Mr. Ernst): Wait a minute now. Did anyone say anything about whether they would work or would not work?

Trial Examiner Ruckel: They didn't work, you said?

The Witness: No, they didn't work. No, I don't recall Parks putting it in exactly those words. He said, "I guess we can't do anything about it."

Q. (By Mr. Ernst): What did you then do?

A. Well, that was a little more than I had bargained for, so after I could collect my senses a little bit, I remarked that there was one thing I could do, and I went out to the elevator and got the elevator man, who is a special policeman at that time of the day, and asked him to take out Malcolm Parks and Albert Hinde, who had no business in there at that hour, which he did. [671]

* * *

Q. Now, how long did the group of the employees who were there remain in the operating room?

A. Well, as close as I can recollect, it was about 1:30. At that time, Mr. McDowell—

Q. Wait a minute. I would like first to bring this up chronologically.

Now, what did these people do between the time Parks and Hinde left and 1:30; that is, the people who had reported to work at 12 o'clock?

(Testimony of Leo Bash.)

A. They just sat there. There was a little bit of talk among themselves. [673]

* * *

Q. (By Mr. Ernst): Now, Mr. Bash, do you recall that you had a telephone conversation with Sylvia Pottle during the few days after January 21st? A. Yes, that was Sunday evening.

Q. Do you recall what time it was?

A. Oh, around 8 or 9 o'clock, somewhere along in there.

Q. Where were you at the time you made it?

A. At the office.

Q. Do you recall now what you said and she said in that conversation?

A. Well, essentially, I couldn't quote it word for word.

Q. Now, at that time did you ask her to come back to work? A. No.

Mr. Berke: What was the answer?

(Answer read.)

The Witness: No.

Q. (By Mr. Ernst): Will you state as best you can what was said by you and what was said by Miss Pottle?

A. Well, we discussed the present situation pro and con.

Mr. Berke: Will you tell us what it is, please, the language that you used?

Mr. Ernst: I am willing to have it stricken out. [674]

(Testimony of Leo Bash.)

Q. (By Mr. Ernst): Will you start again and say what you said and what she said. Repeat what was said, even if it takes a couple of minutes to do it.

A. Well, I called Sylvia to tell her that I felt certain that she had gotten only the one version as to why this trouble came up and if she had taken the time or made the effort to talk to me or to Mr. McPherson or some person who represented the company, before she joined this group, that she probably would never have joined.

Mr. Brotsky: Are you relating what you stated to her?

The Witness: Yes. And at that time she wanted to know what it was about, and I read her a copy of the inter-office communication I had sent to Mr. McPherson, in which I informed Mr. McPherson that I had suspended Charles Jones.

Q. (By Mr. Ernst): You are talking about the one you referred to earlier in the testimony?

A. Yes, I read that off to her and the conversation went back and forth, and she said, "Well, I still think a union is a good thing," to which I agreed. But I also said that in this particular case, in the case of this particular union, that it would have been so easy to have obtained an agreement and recognition with the company, if the leaders of this union had simply complied with the signing of the non-communist affidavit clause in the Taft-Hartley law, whether or not they were communists, just

(Testimony of Leo Bash.)

for the sake of the membership [675] of the union, and that if they had done so, they would have had Labor Board recognition, the service of the Labor Board, and this trouble that we were now in could never have developed.

* * *

A. And then she said she liked all the people, she liked her job with Globe and I also informed her that I liked these people, most of them, and that I had nothing personal against any of them and that it was because they had not been fully informed of exactly what the truth of the matter was that they had walked into a situation whereby so many of them had lost their jobs, and that I regretted very much, and that the way I felt then, if I had this situation to do over again, that I would have handled the situation in some other manner, that I wouldn't have permitted these people to lose their jobs, if I had known that that was what was going to develop.

Q. Now, did you tell her that this whole trouble had to [676] come to a head?

A. Not that I recall.

Mr. Berke: What was the answer?

The Witness: Not that I recall.

Q. (By Mr. Ernst): Did Sylvia Pottle say to you, "I think they were starting out with Jones and then going down the line," and did you reply thereto, "You have the general idea"?

A. No, I didn't make any such reply.

Q. Did she make that statement?

(Testimony of Leo Bash.)

A. Not that I recall.

Q. Now, did you on that same evening talk to Mr. Wheeler? A. This was Sunday evening?

Q. Yes. A. Yes, I talked to Les Wheeler.

Q. Do you recall about when you talked to him?

A. It was sometime about the same time I had made the necessary contacts for having the graveyard shift covered, because that is when traffic started to get heavy at midnight, Sunday night, which is Monday morning in the Orient and therefore I called Sylvia first—no—it must have been before that that I called Les, because Les was due at midnight and I made the call to find out if he intended to come in.

Q. Now, Mr. Bash, you said that the traffic got heavy at midnight on Monday morning, 12:01 Monday morning? [677]

A. That is when it begins to get heavy. That is 8 a.m. in the Orient, the next day.

Q. Now, did you discuss with Mr. Wheeler the matter of his coming in to work?

A. Yes, I did.

Q. Did you tell him——

Mr. Brotsky: Just a moment. May we have the conversation?

Trial Examiner Ruckel: What did you say and what did he say? You opened the conversation?

The Witness: Yes, I opened the conversation. I said, "Les, you undoubtedly have heard what has taken place down here?" "Yes."

(Testimony of Leo Bash.)

Q. (By Mr. Ernst): Wait a minute. Would you make it clear as to who said what in your conversation, wherever it isn't clear?

A. Well, I asked him, I said, "Les, you undoubtedly have heard what has taken place down here?"

And he said, "Yes."

Q. Then what did you say?

A. And I says, "Well, under the circumstances, Les, there was some question in my mind as to whether you were going to come in tonight to go on your regular graveyard shift or not. Now, I said, "I don't want to have you think that I am trying to put any pressure on you to make you come in, but if you [678] do want to come in, your job is here and I suggest, in view of the fact of which you are well aware, because you have made the same statements yourself previously, that because of your color you have two strikes on you, that you come down and protect your job."

And he said that he intended to come in at midnight. He would be there.

Q. Was there anything more in that telephone conversation? A. No, not that I recall.

Q. Now, did you have a conversation with Mr. Guerrero on Sunday? A. Yes, I did.

Q. At what time did you say you came to work on Sunday?

A. I come in around 12:30 or 1:00 p.m.

Q. And was Mr. Guerrero scheduled to be in at that time?

(Testimony of Leo Bash.)

A. He should have been in at 8 o'clock that morning.

Q. Was that one of his regular shifts?

A. Yes. [679]

* * *

Q. (By Mr. Ernst): Now would you relate the telephone conversation that you had with Mr. Guerrero shortly after you came to work on Sunday?

A. Well, when I came in, the acting supervisor informed me that Paul Guerrero had previously phoned in that he couldn't come to work, that he was sick, and therefore she had called and secured someone to cover him.

So I sat down to the phone and I called Paul Guerrero's number and I got hold of Paul on the phone.

Trial Examiner Ruckel: Did you talk to Paul, personally?

The Witness: I did, yes, and I said, "Paul, according to the watch list you were supposed to show up here at eight o'clock this morning."

"That is right."

And I said, "You say you are sick. What is the matter with you?"

He says, "I got a cold."

And I said, "You don't sound like you have got a cold to me." I says, "In view of what has developed down here at the office," I says, "I want you to do this, Paul: I want you to come down here now, right now, immediately, and report for work."

(Testimony of Leo Bash.)

If you are sick, you will be excused immediately and your job will be fully protected."

I says, "If you don't come down now, get a doctor's certificate to cover yourself, because I don't believe you [681] are sick."

And that was it. [682]

* * *

Q. Now, on that Sunday did you talk to Lillie Friend on the telephone?

A. Yes, I believe I talked to Lillie Friend that Sunday evening.

* * *

Trial Examiner Ruckel: What watch was she on, Lillie Friend?

The Witness: Lillie Friend was on No. 11, which is an 8 to 4 watch, Monday, Tuesday, Wednesday, Thursday and Friday, [684] with Saturday and Sunday off.

Trial Examiner Ruckel: That is, 8:00 p.m.?

The Witness: 8:00 a.m. to 4:00 p.m. [685]

* * *

The Witness: I called Lillie, she answered the phone, and I asked her if she knew, or was aware of what had taken place at Globe Wireless since she left Friday afternoon, and I don't remember exactly what her reply was, but I believe it was of the nature that she didn't know too much about it, and that she was at the present taking care of a very sick baby. And, anyhow, I went ahead as best I could and explained to her that the 4:00 to mid shift and the graveyard shift likewise had pulled a sit-

(Testimony of Leo Bash.)

down strike and got themselves discharged for it, and that I hoped that she was not involved, or wouldn't let herself be involved. I believe I also mentioned the fact that I had noticed a remarkable improvement in her work in the last few months, and that her work was entirely satisfactory, and that, "For Heaven's sake, come on down in the morning and protect your job." And she said, "Oh, yes, Leo, I will be there."

Q. Did she come in the next morning?

A. Yes, she did.

Q. At what time?

A. Around 8:00 or thereabouts.

Q. Did she come in, in other words, at the usual time? A. Yes, I would say that she did.

Q. Did you meet her outside of the operating room or in the [686] operating room or—

A. Yes, I met she, Paul Guerrero and Les Wheeler standing just inside the cloak room, I would say four or five feet in to the cloak room.

Q. Now, at that time had Guerrero and Wheeler and Mrs. Friend hung up their hats and coats?

A. No.

Q. Did you see them come into the operating room from outside and go into the, or did you see them come into the operating room?

A. No, I didn't see them come in.

Q. Did you see them in the cloak room?

A. Yes, I saw them in the cloak room. I don't remember whether someone told me they were there, or how it was, but that is where I saw them.

(Testimony of Leo Bash.)

Q. And did you then go over to the cloak room to see them? A. I did, yes.

Q. At that time did you talk to all three of them as a group, or to them individually?

A. I talked to each one individually, I know, and I may have made some statements to them as a group. I don't remember.

Q. But all three of them were there present during the entire conversation that you had with them?

A. That is right.

Q. Did they leave as a group? [687]

A. I didn't see them leave.

Q. Now, would you state how the conversation opened?

A. Well, I don't know exactly, but I believe in turn—I don't know just exactly what turn it was, I spoke to Paul Guerrero first, I said, "Paul, have you got that doctor's certificate I told you to bring?" He said, "Oh, that is easy to get." I said, "You are fired."

I turned to Les Wheeler, I says, "You are supposed to be in at midnight. Why are you coming in at 8:00 o'clock in the morning?"

He said—I don't know exactly what he did say. I says, "You are fired."

Then I turned to Lillie Friend, I says, "Lillie, your job is in there, take off your coat and your wraps and go to work." And I says to Les Wheeler and Paul Guerrero, "I know you are going to make me reinstate Chuck Jones, now get down there on

(Testimony of Leo Bash.)

the bricks with the rest of them and make me do it." And I walked away.

Q. Now, did Lillie Friend talk to you at all at this time?

A. Well, if she did I don't remember what it was. I believe she did say she didn't know something about what is was all—— [688]

* * *

Q. (By Mr. Ernst): Did you tell Lillie Friend that she was fired? A. No, I did not. [689]

* * *

Q. Now, I would like to have you carefully consider what happened on the afternoon of January 21st, and particularly what happened after you told the group that they were fired and what you did from there on until, well, for a considerable period of time thereafter?

* * *

Q. (By Mr. Ernst): Mr. Bash, that afternoon did you have a conversation with Sylvia Pottle in the cloak room, in the operating [693] room at Globe Wireless after you had told everybody that they were fired?

A. No, I don't recall any such conversation.

Mr. Ernst: That is all.

Trial Examiner Ruckel: Cross-examine.

(Testimony of Leo Bash.)

Cross-Examination

By Mr. Berke:

Q. You say you don't recall having any conversation with Sylvia Pottle in the cloak room?

A. That is correct.

Trial Examiner Ruckel: That you did not?

The Witness: I do not recall that.

Trial Examiner Ruckel: Oh!

Q. (By Mr. Berke): You no longer hold a position, the position, as I understand it, that you did hold in January of 1949? A. That is correct.

Q. Is the job that you hold now a lower classification than the one you held before?

A. That is correct.

Q. The job that you held in January, 1949, was that of Chief Operator, is that correct?

A. That is right.

Q. Did you have any Supervisors under you?

A. I did, yes, three.

Q. How many? A. Three. [694]

* * *

Q. (By Mr. Berke): Were you asked to resign some time after January, 1949, from your position?

A. I was.

Q. And you refused? A. I did.

Q. And as a result you were demoted to supervisor? A. No, I don't believe that.

Q. Well, in any event, you were demoted after that, is that correct?

A. By my own request. [695]

* * *

(Testimony of Leo Bash.)

Q. (By Mr. Berke): Now, in this conversation that you had with [698] Mr. Jones some time during the day of January 20th in the operating room with respect to "Communism" and "fink," and so forth——

Mr. Ernst: Well, I object to the characterization of the conversation. If he wants to talk about one of the particular times and describe——

Trial Examiner Ruckel: That identifies the conversation, both words were used. You may answer.

Q. (By Mr. Berke): Why did you call Mr. Jones a Commie and a fellow-traveler?

A. Well, for the reason that he had made the statement that he expected that I was going to pick his work to pieces from here on.

Q. And when you said "All you Commies and fellow-travelers" whom were you referring to?

A. All the Communists and fellow-travelers.

Q. All the ACA members, is that right?

Mr. Ernst: I object on the ground he has had an answer to his question.

Trial Examiner Ruckel: He may answer. This is cross-examination. He may answer.

Mr. Ernst: He is becoming argumentative now.

Mr. Berke: That is your view.

Trial Examiner Ruckel: Go ahead, go ahead.

A. The answer referred to all Communists and fellow-travelers [699] regardless of union affiliation or no union affiliation.

Q. (By Mr. Berke): But including ACA members?

(Testimony of Leo Bash.)

A. If there are any Communists there, yes. [700]

* * *

Trial Examiner Ruckel: The witness does hesitate, he has hesitated all through his conversation, but the witness doesn't appear to be evasive. His answers, when they come, seem to be on the point, at least. [708]

* * *

Q. (By Mr. Berke:) Why did you call Miss Pottle up on the telephone? [711]

* * *

The Witness: I called her to inform Sylvia why Charles had been suspended and later discharged, because she was the only one to my mind that raised any question on the subject at all.

Q. (By Mr. Berke): Why did you feel that it was necessary to call her rather than to talk to her, when she was there the day the event occurred?

* * *

A. Well, it is hardly possible to talk the reason with people who are on a sit-down strike, and I didn't attempt it.

Q. (By Mr. Berke): Were you endeavoring to win her away from the group? Was that your purpose? [712]

* * *

A. No, that was not my purpose.

Q. (By Mr. Berke): Why did you call Mrs. Friend on the telephone?

A. To find out if she was going to report for work at eight o'clock the next morning.

(Testimony of Leo Bash.)

Q. Why were you concerned as to whether she was going to report to work?

Mr. Ernst: I object on the grounds that it is argumentative and ridiculous.

Trial Examiner Ruckel: He may answer.

A. We were shorthanded. [713]

* * *

Q. What was your purpose in calling Les Wheeler?

A. To find out if he was going to come to work at midnight. [714]

* * *

Q. (By Mr. Berke): The question was, when Parks came in with Hinde at midnight, January 21st, going into January 22nd, whether he asked for reinstatement of Jones as well as the 4 to midnight shift?

A. No, he did not.

Q. What did he ask?

A. He asked for reinstatement for Jones. [716]

* * *

Q. Do you remember in the course of your telephone conversation with him, telling him that you didn't believe he [718] was sick and that you wouldn't stand for any tricks?

A. I believe I said that, something similar to that.

Q. Do you remember saying that you wouldn't stand for any Barlow's tricks?

A. Yes, I believe I said something like that.

Q. You were under the impression then, were

(Testimony of Leo Bash.)

you, that he had joined the group and that is why he was staying away that day? A. Yes.

Mr. Ernst: I object.

Mr. Berke: He answered the question. I want the record to show.

Mr. Ernst: I object to the question and if you don't let me get my statements in, I am going to have to start objecting before you finish your question, and I don't want to do that, Mr. Examiner.

Trial Examiner Ruckel: Objection sustained.

* * *

Q. (By Mr. Berke): Now, when you called Mrs. Friend why on that occasion did you tell her during the course of your conversation that her work had remarkably improved? I want to know why it was on that occasion that you made reference to [720] that?

* * *

The Witness: And so I spoke to Lillie Friend about it, and she asked that a witness be present, and the witness was Malcolm Parks. At that time I showed her, asked her if she didn't—now that she knew about this if she wouldn't care to correct this and she said, "Yes," she would, and why hadn't I mentioned it before, that she had no idea that her work was not satisfactory. And I told her that under the circumstances, unless I could prove my statement, I had better keep my mouth shut, or words to that effect, because the ACA would jump right down my throat unless I could prove it. In

(Testimony of Leo Bash.)

this case I had her own brothers and sisters as witnesses, that she was soldiering on the job. Now, then, the reason why I told her that on that occasion was that I wanted her to know that her work was now satisfactory, and if she wanted to come back she had nothing to fear from me [721] as far as her work was concerned. [722]

* * *

Q. Did you know whether or not each employee was an ACA member? A. No, I did not.

Q. Which ones did you not know?

A. Well, I didn't know about Paul Guerrero, I didn't know about Madeline Bruce, I didn't know about Tessie Lorenzo, I didn't know about Lorraine Conger, I didn't know about Violet Leach, I didn't know about Ted Byer. I think that about answers the question. As a matter of fact, I can probably clarify the question. When I found out who were ACA members I was strictly and completely [728] amazed.

* * *

Q. Now, using that list, if necessary, will you state whether the following persons were present during the incidents which [730] led to your timing them out on the afternoon of January 21st, Rudy Niemi, did you time his card out?

Mr. Ernst: I object to doing it on this basis. I think he should do it on the basis of who was there.

Trial Examiner Ruckel: He may answer it any way.

(Testimony of Leo Bash.)

Q. (By Mr. Brotsky): Did you time his card out on the clock, Rudy Niemi? A. Yes, sir.

Q. Viola Williams? A. Yes.

Q. Bruce Risley? A. Yes.

Q. Malcolm Parks? A. Yes.

Q. Was he working that day? A. No.

Q. Did you time his card out anyway?

A. I believe I did.

Q. Sylvia Pottle? A. Yes.

Q. Pauline Smith? A. Yes.

Q. Al Hinde? A. Yes.

Q. And all the individuals I have named were in the group that [731] joined Mr. Parks and Mr. Jones around you and engaged in the discussion concerning the reinstatement of Jones; is that correct?

A. To the best of my knowledge they were, [732] yes.

* * *

Q. Now, let's get to something you do recall. Do you recall whom you had escorted out by the building guard? A. Yes.

Q. For being in the group that was with Malcolm Parks and Al Hinde to protest Chuck Jones' reinstatement?

Mr. Ernst: I object to the "for." He says he knows who the people were that were in the group. Let's go on and find out who they were. I don't think we need to characterize it any further.

Trial Examiner Ruckel: Who are they?

Mr. Brotsky: I think it will be quicker—

(Testimony of Leo Bash.)

Q. (By Mr. Brotsky): Was Lorraine Conger in that group?

Mr. Ernst: It might be quicker if he reads the names off.

Trial Examiner Ruckel: Let counsel do it his own way, Mr. Ernst. Go ahead.

Q. (By Mr. Brotsky): Was John Gyuresik in that group? A. Yes.

Q. Was Virginia Kelso in that group?

A. Yes.

Q. Was Jesse McLin in that group? [733]

A. Yes.

Q. Was Homer Mulligan in that group?

A. Yes.

Q. Was Louis Pena in that group?

A. Yes.

Q. As a matter of fact, you asked Louis Pena, did you not, "Are you in this group?"

A. Yes, I did.

Q. Was Violet Leach in that group?

A. Yes.

Q. Was David Sheaffer in that group?

A. Yes.

Q. Was George Rosengren in that group?

A. Yes. [734]

* * *

Q. I see. Now, from the time that you called Lillie Friend on Sunday until she came in Monday morning did you remove her card from the rack?

A. No, I did not. [735]

* * *

(Testimony of Leo Bash.)

Trial Examiner Ruckel: The witness has already testified he was prepared to hire her when she came in. [736]

* * *

Q. Now, when you called Les Wheeler to find out if he was coming in at midnight had you been informed by any company official concerning a policy toward a worker who said he would not be in his regularly scheduled shift?

A. No, I had not.

Q. You had not? A. No.

Q. Were you instructed by any company official to call these various people that you called?

A. No, I was not. [737]

* * *

Q. When you arrived at the office of the company Monday morning at that time had there been a picket line or lockout line established that you had seen in front of the Company's offices?

A. Monday morning?

Q. Yes.

A. No, as a matter of fact, I had been there all night, and I didn't go down until around noon, or some time around there, [739] and I didn't notice what time they established a picket line.

Q. I see. Well, what time did you speak to Paul Guerrero, Les Wheeler and Mrs. Friend that morning? It was before you had gone down at all, wasn't it? A. That is right.

Q. Then when you stated "If you want Jones

(Testimony of Leo Bash.)

reinstated you can go down on the bricks and join the rest of the group'' you didn't know at the time that there had been a picket line?

Mr. Ernst: I object on the ground that it is argumentative.

Trial Examiner Ruckel: Oh, he may answer.

A. I did know because the 8:00 to 4:00 shift come up right through it, and they told me about it. [740]

* * *

Q. Now, is there anything in the time of day that affects the volume of traffic on circuits?

A. Yes.

Trial Examiner Ruckel: Does the record show that, Mr. Ernst?

Mr. Ernst: I am not sure. The one thing I wanted to cover was with respect to the mid to 8 a.m. period, and I wanted to pick up also certain things that were raised on [743] direct, Mr. Examiner—I mean on cross—on this particular point.

The Witness: Well, it seems to be or is a practice of business houses to file their telegrams just before the close of the business day, and in the case of San Francisco here, that would generally begin around 4:30 and continue on until 6 or 6:30 p.m. in the evening. That is when the file is the heaviest. That, of course, corresponds to 8 o'clock in the morning the next day in the Orient, and those business houses over there want those telegrams as soon after 8 o'clock as they possibly can get them, and when they are unduly delayed, they complain.

On the other hand, midnight here is 4 p.m. in the Orient and at 4 p.m. or midnight here traffic begins

(Testimony of Leo Bash.)

to get heavy in the Orient, because it is like here, the business houses are closing for the day and as is an established custom with business houses, they file their business, their traffic, as one of the last things they do before closing. Consequently, at around 2 or 3 or 4 o'clock in the morning is the busiest time for traffic flowing from West to East. [744]

* * *

Q. Now, is your pay as a supervisor at the present time based upon any published schedule of rates of pay?

A. Yes. It is based on the expired ACA Globe agreement.

Q. In this agreement that is Respondent's, marked Respondent's Exhibit 11?

A. Yes. [746]

* * *

Q. And the other employees in the operating room were paid in accordance with the same schedules?

Mr. Berke: I object to that as irrelevant and immaterial.

Trial Examiner Ruckel: Objection sustained as to the other employees. [747]

* * *

Mr. Berke: Before we proceed, Mr. Examiner, I at this time move that we exclude from the hearing room all witnesses of the Respondent except those who are company officials.

(Testimony of Leo Bash.)

Mr. Ernst: I thank you for your fair treatment of me.

Mr. Berke: That is an unfair statement, because the Trial Examiner granted your motion with respect to those who were witnesses, if you will recall, and not charging parties. [753]

* * *

JAMES H. JONES

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. Will you state your name, please.

A. James H. Jones.

Q. And your address?

A. 76 Middlefield Drive, San Francisco.

Q. What is your work?

A. I am Commercial Manager of Globe Wireless. [754]

* * *

Q. Do you recall the afternoon of January 21, 1949? A. Definitely.

Q. And at around 5:15 of that afternoon were you in the office where Mr. McPherson's desk is and Mr. Neil Brown's desk is?

A. I was in Room 652. My desk isn't located in that section of the office. Mine is located right by the entrance coming into 652 about 12 feet,

(Testimony of James H. Jones.)

maybe 15 feet, from the telephone operator, 10 feet, 8 feet, 6 feet, maybe.

Q. That is, you were very close to the telephone operator? A. Yes.

Q. My recollection of that room is that there is a small railing around a space maybe 10 feet square opposite the door and next to that space is the telephone operator; is that recollection correct?

A. That is on your left as you go in, that is right. [755]

* * *

Q. And did Mr. McPherson come down to talk to the people who were in this space near the telephone operator's place of work?

A. Mr. McPherson was there when—I was in the operating room at 5:15, when they came out of the operating room and went in there. When I went in about five or six minutes later, Mr. McPherson was standing there talking to the group of people.

Q. I see. And did you overhear this conversation?

A. I overheard, I would say, the majority of it, yes.

Q. Now, do you recall some woman who was talking very loudly to Mr. McPherson?

Mr. Berke: Just a moment, that is an improper question and I object to counsel characterizing the tone. Let the witness tell, if he can. Ask him the proper question.

(Testimony of James H. Jones.)

Trial Examiner Ruckel: Can you identify the person?

Q. (By Mr. Ernst): Do you know the name of the person that I referred to so improperly?

A. I don't know the name. The name has been mentioned to me. I heard someone talking to me about the name the other day, but there was a woman who came in a few minutes, five or ten [756] minutes. I don't recall how long it was. She appeared to be hysterical and——

Mr. Berke: Just a moment. I object to what she appeared to the witness.

The Witness: Well, I don't know what else you would call it.

Trial Examiner Ruckel: Objection sustained.

The Witness: If you heard someone scream with tears in her eyes——

Mr. Berke: Describe what you saw and heard.

Mr. Ernst: Will you instruct General Counsel not to talk to the witness.

Trial Examiner Ruckel: If she was talking in a loud voice, you may say so.

The Witness: She was.

Trial Examiner Ruckel: Was she screaming?

The Witness: To me, she was screaming. I would call it screaming.

Q. (By Mr. Ernst): Do you recall what she was talking about?

A. The rapidity of her conversation was so fast, and to me, so incoherent, I couldn't tell what she was talking about.

(Testimony of James H. Jones.)

Q. What do you recall about her statements now?

A. Well, she was trying to condemn certain people in the organization, this and that and the other——

Mr. Berke: Just a moment. I object to that unless he tells [757] the words used.

Trial Examiner Ruckel: Tell what she said, so far as you could make out.

Q. (By Mr. Ernst): Who was the person she was referring to? A. Mr. Leo Bash. [758]

* * *

Q. (By Mr. Ernst): Now, Mr. Jones, do you recall that Mr. McPherson was talking to or attempting to reply to this woman's statements?

A. To the best of my recollection, this lady was talking so fast and so loud, he didn't——

Mr. Berke: I object to that as not being responsive.

Trial Examiner Ruckel: Let him finish.

Q. (By Mr. Ernst): Don't be disturbed by those comments. Go right ahead and tell your story as you understand it and recall it.

Trial Examiner Ruckel: Is your answer that you don't recall or you didn't understand? [759]

The Witness: Well, I am trying to tell you, because the lady was, to me, she was——

Mr. Berke: The question was, what did McPherson say?

Trial Examiner Ruckel: What did he say to her, McPherson?

(Testimony of James H. Jones.)

The Witness: That is what I am trying to tell you, that he tried to talk to her but with all of her hollering and screaming——

Trial Examiner Ruckel: All right, he didn't succeed?

The Witness: Her voice drowned him out.

Trial Examiner Ruckel: Then you didn't hear what he had to say?

The Witness: Not at that moment, no.

Q. (By Mr. Ernst): Did you hear anything that Mr. McPherson had to say?

A. I did, after she had had her say-so over.

Trial Examiner Ruckel: Then what was it that Mr. McPherson said?

The Witness: He told this lady, as I recall it now, he told her—nothing can be verbatim, as far as I am concerned.

Trial Examiner Ruckel: The point is, what did he say?

Q. (By Mr. Ernst): Give us your best recollection.

A. The dismissal of Mr. Jones had nothing to do with her or any of these other employees, and that the circuits were waiting to be manned and these employees and she could man the circuits of the company. [760]

Q. Do you recall anything else?

A. Well, something came up—I can't recall that—that made a deep impression upon me, because I couldn't understand why they wouldn't——

Mr. Berke: Just a moment, I object.

(Testimony of James H. Jones.)

Q. (By Mr Ernst): I just want to hear if you——

A. He repeated again to them that they could go back to work and man the circuits.

* * *

MAE MILLER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. Will you tell me your name, please? [761]

A. Mae Miller.

Q. And what is your address?

A. 1345 Taylor Street.

Q. San Francisco? A. San Francisco.

Q. And will you tell me what your work is now?

A. Administrative bookkeeper.

Q. And by whom are you employed?

A. Mr. Jenkins, William P. Jenkins.

Mr. Berke: Will you please speak louder. I can't hear that.

Q. (By Mr. Ernst): Will you please speak up. And where do you work?

A. In the Accounting Department.

Q. Of what Company?

A. Globe Wireless, Ltd.

Q. And in the San Francisco office?

A. San Francisco office.

(Testimony of Mae Miller.)

Q. Now, what is the room number of the room in which you work? A. 652.

Q. And is that the room in which the telephone operator sits? A. The switchboard operator?

Q. Yes. [762] A. Yes.

* * *

Q. Now, do you recall the afternoon of January 21, Friday afternoon? A. Friday? Yes.

Q. And do you recall at 5:15 on that day, would you state, whether a group of employees from the operating room came into this entrance way by the switchboard operator?

Mr. Berke: Just a minute. I object to leading questions.

Trial Examiner Ruckel: What difference does it make in this case?

Mr. Berke: All right.

Trial Examiner Ruckel: Do you remember a group came in?

The Witness: Yes.

Q. (By Mr. Ernst): And did you overhear any of the conversation? [763]

A. Well, I heard part of it. I was on my way out and, well, it caused quite a bit of commotion, so I naturally was curious to see what was going on.

Q. And did you see Mr. McPherson there?

A. Yes.

Q. Did you hear Mr. McPherson talking to the people?

A. Yes, he was talking but he was talking very

(Testimony of Mae Miller.)

low. This one girl was talking very loud and I heard mostly what she was saying. I didn't hear too much of what McPherson was saying.

Q. Now, when this girl that was speaking so loudly finished, did Mr. McPherson say anything?

A. Well, yes. I can't tell you word for word what he said.

Q. I assume that you can't, as it is a long time ago, but will you state as best as you can now recall anything that you overheard Mr. McPherson saying to the people. Paraphrase it but try to say it as closely as you can now recall it what you heard him say.

A. Well, the impression I got was——

Mr. Berke: Just a moment.

Q. (By Mr. Ernst): Don't say your impression. Try to quote him as best you can.

Mr. Brotsky: If you can't recall, just state that.

Trial Examiner Ruckel: Do you recall some of his words?

The Witness: Well, the only thing I remember was that he was trying to talk them into going back to work. [764]

Trial Examiner Ruckel: What did he say, go back to work, or won't you go back to work, or will you go back to work, we would like to have you go back to work, what? I have given you four. What did he say?

A. Well, that they should go back to work, that this Jones case shouldn't affect their work. That is the impression I got.

LORRAINE E. CONGER

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. You previously testified, Miss Conger, that you attended a union meeting on the evening of January 21st? A. That is right.

Q. And that you were at the meeting from about 8:00 until 9:30, or so, when you telephoned into the office at Globe?

A. I don't recall the time; I was late to the meeting.

Q. Well, anyway, you recall that you did testify that you telephoned in to tell them that you would be in? A. I do.

Q. Now, at that meeting there was a discussion, I believe, as to the discharge of Chuck Jones?

A. There was some talk of it. There was a lot of confusion.

Q. And was there not also a bit of talk about—
Mr. Brotsky: Just a moment. This is direct examination. He is leading the witness.

Mr. Ernst: I am. She is obviously an adverse witness. I am entitled under the Federal Rules to cross-examine her by leading questions.

Trial Examiner Ruckel: Keep it less leading. [781]

Mr. Ernst: I am entitled to do so.

Mr. Brotsky: This is your witness, you called

(Testimony of Lorraine E. Conger.)

her. If you want to cross-examine—you made an effort to, it was ruled irrelevant.

Trial Examiner Ruckel: Her hostility has not been demonstrated yet.

Mr. Ernst: She is an opposing party, it is ipso facto, it is a matter of law, an opposing witness.

Mr. Berke: You are bound by her answers to your questions if you call her as your witness. So far she has done all right.

Trial Examiner Ruckel: If she develops to be reluctant I will permit you to cross-examine.

Mr. Ernst: I object to this ruling on the grounds that I am entitled to examine her on that basis, and that the law requires the Examiner to permit me so to question this witness.

Trial Examiner Ruckel: That is not my understanding.

Mr. Ernst: Then I am being denied my rights under the law and his ruling.

* * *

Q. (By Mr. Ernst): Did you also discuss what procedure would be taken by the group at midnight or shortly thereafter?

A. There may have been such discussion. I don't remember.

Q. You don't remember any such discussion?

A. No.

Q. Do you remember a discussion of anything else at that meeting than what I have just referred to?

A. No.

(Testimony of Lorraine E. Conger.)

Mr. Berke: I object to that as being wholly irrelevant to the issues involved here. [783]

Trial Examiner Ruckel: You may answer.

Mr. Ernst: She already has answered.

Do you have her answer, Miss Reporter?

The Reporter: Yes.

Trial Examiner Ruckel: It may stand. Go ahead.

Q. (By Mr. Ernst): Now, at the meeting, in the course of this discussion of what happened at 4:15 to 5:30, do you recall that it was reported that Mr. Bash told the group that they were fired?

Mr. Berke: Just a moment. I object to that as being leading.

Trial Examiner Ruckel: She may answer.

Mr. Ernst: It is not leading in the first place.

Trial Examiner Ruckel: She may answer.

A. I remember hearing something about them being fired, yes.

Q. (By Mr. Ernst): Do you remember also that there was some discussion of the fact that they went to Mr. McPherson later on, and that he also advised them that they were fired or discharged?

A. I heard that also.

Q. And do you recall hearing that the group had gathered around Mr. Bash to "protest" the discharge of Mr. Jones? A. Yes, sir.

Q. And when you left the meeting at its close did you expect that you and the other workers on the mid to 8:00 a.m. shift [784] would do substan-

(Testimony of Lorraine E. Conger.)

tially what the ACA people had done at 4:15 to 5:30?

Mr. Berke: Just a moment. I object to that as incompetent, irrelevant and immaterial.

Trial Examiner Ruckel: Objection sustained.

* * *

Mr. Ernst: Mr. Risley, please.

BRUCE B. RISLEY

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. Would you state your name?

A. Bruce Risley, Marin City, California.

Q. Would you state your present occupation?

A. I am——

Mr. Berke: Wait a minute. How is that material, as to his present occupation?

Trial Examiner Ruckel: Well, why not?

Mr. Berke: That is what I am trying to find out, why is it, what is the relevancy?

Trial Examiner Ruckel: It is a normal question, to ask his address, his business, his name.

A. I am the Secretary of ACA, Local 9.

Q. (By Mr. Ernst): How long have you held that position?

A. A short time, a couple of months.

* * *

(Testimony of Bruce B. Risley.)

Q. (By Mr. Ernst): Now, Mr. Risley, when did you become employed at Globe Wireless, if at all?

A. December 10, 1947.

Q. How did you gain your employment with Globe Wireless?

A. I was assigned through the Union Hiring Hall.

Q. The ACA Union Hiring Hall?

A. Correct.

* * *

Q. (By Mr. Ernst): Did you fill out an employment application, or a history of your previous employment when you went to work at Globe?

Mr. Brotsky: Same objection. The Examiner has sustained it.

Trial Examiner Ruckel: He may answer. [788]

A. I did.

Q. (By Mr. Ernst): And at that time did you——

Trial Examiner Ruckel: If he was hired through the Union Hiring Hall, why, he certainly must have been a member of the Union, and the company must have known it. That is the point.

Q. (By Mr. Ernst): And in that application did you not indicate that you were employed by the American Communications Association at a salary of \$70.00 a week as representative for the period from 1937 to 1947?

* * *

Trial Examiner Ruckel: The salary is not material. I sustain any objection as to the salary.

(Testimony of Bruce B. Risley.)

Mr. Ernst: I offer to prove that it was at that salary rate.

* * *

Q. (By Mr. Ernst): Mr. Risley, during the period of your employment at Globe Wireless did you obtain a furlough to accept a position with the Union in official capacity for the period of the furlough, to be for the duration of the Mackay strike?

Mr. Berke: Just a moment. I object to that, it is irrelevant and immaterial, it has no bearing on the issue in this hearing.

Trial Examiner Ruckel: Well, it has some bearing. He may answer.

A. I did. [790]

* * *

NEIL D. BROWN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. Will you state your name, please?

A. Neil D. Brown.

Q. And your address?

A. 20 Northview Court, San Francisco.

Q. By whom are you now employed?

A. Globe Wireless Company.

Q. What is your present position?

A. I am a Vice-President.

Q. Where is your office?

(Testimony of Neil D. Brown.)

A. It is in Room 652.

Trial Examiner Ruckel: Keep your voice up, Mr. Brown.

The Witness: Room 652 at 141 Battery Street.

Q. (By Mr. Ernst): San Francisco, California? A. Correct.

Q. Is this room, the number of which you have just given, across the hall from the operating room of the Globe Wireless in San Francisco? [791]

A. It is.

Q. In the course of carrying on your duties do you frequently go into the operating room?

A. I do from time to time.

Q. And do you know the employees in the operating room yourself.

A. I do, a lot of them.

Q. And do you from time to time talk to them about various things? A. I do.

Q. Do you advise the employees that your door was always open to them for them to come in and talk to you about any problems that they might have as to their employment? A. I do.

Mr. Brotsky: May we have the time and place, and to whom and what employee? Otherwise I will move that it be stricken.

Trial Examiner Ruckel: Well, it was always open, is that it, Mr. Brown?

The Witness: That is correct.

Q. (By Mr. Ernst): Now, Mr. Brown, who is your immediate supervisor?

(Testimony of Neil D. Brown.)

A. In the office?

Q. Yes. A. General Boatwright.

Q. And what is his position? [792]

A. He is senior Vice-President of the Company.

Q. Now, were you ill last winter?

A. I was.

Q. And for what period of time approximately?

A. From the end of December until some time in March.

* * *

Mr. Ernst: Mr. Examiner, at this time I would like to move that the case be continued so that I can have an opportunity to take the depositions of all of the charging parties who have not testified with respect to what actually happened, so that I can have that available, and can prepare to conclude my case.

Mr. Berke: Of course, there is objection to that, the most unorthodox procedure. If counsel wanted them he has not asked us to bring those people in.

Those he did ask we made [793] available. He was told at the beginning of this hearing that if he wanted people that were not going to be here that he could apply for subpoenas in the usual manner. He has not done either.

Mr. Ernst: I like to handle the case in the ordinary fashion, in which you know what witnesses say.

Trial Examiner Ruckel: Let's have no discussion about that. The motion is denied. [794]

* * *

JAMES A. McDOWELL

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. Will you state your name?

A. James A. McDowell.

Q. Will you talk up a little louder so that the people in the room can hear you, particularly the reporter in front of you? A. Yes, sir.

Q. What is your position?

A. Supervisor at Globe Wireless.

Q. And whereabouts, what city?

A. San Francisco, California.

Q. And do you supervise the APO's and the the teletypes and the group who are employed in the operating room at Globe Wireless?

A. I do.

Q. What shift, or what watch were you working on during the period of January, 1949?

A. 4:00 p.m. until midnight [796]

* * *

Cross-Examination

* * *

By Mr. Berke:

Q. You worked under Leo Bash, did you not?

A. Yes. [812]

Mr. Ernst: Object.

Trial Examiner Ruckel: He may answer.

The Witness: Yes, sir.

(Testimony of James A. McDowell.)

Q. (By Mr. Berke): And he directed your work, did he? A. Yes.

* * *

Q. (By Mr. Brotsky): Mr. McDowell, what circuits did you work on the afternoon of Friday, January 21st, actually operate? A. After 4 p.m.?

Q. Yes.

A. I suppose I must have worked all of them, at one time or another.

Q. Did you work Manila? A. Yes.

Q. Was there the usual amount of traffic going out to Manila? A. There was.

Q. And you were able to put that traffic out?

A. No. [813]

* * *

Recross-Examination

By Mr. Brotsky:

Q. Mr. McDowell, you were a member of ACA up to August 15, 1948, were you not?

A. Yes, sir.

Q. Are you still a member of ACA?

A. No.

Q. When did you withdraw or resign?

Mr. Ernst: I object. It is immaterial. Mr. Examiner.

Trial Examiner Ruckel: He may answer. I don't see the materiality now. [846]

A. I quit paying dues around that time.

Q. (By Mr. Brotsky): Right after August 15th? [847]

* * *

(Testimony of James A. McDowell.)

Redirect Examination

By Mr. Ernst:

Q. Mr. McDowell, were you one of the persons who was required to be a member of the ACA under the agreement that expired on August 15th, 1948?

A. I was. [848]

* * *

JAMES B. McPHERSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ernst:

Q. What is your name?

A. James B. McPherson.

Q. And what is your address?

A. 216 Magnolia Avenue, Millbrae, California.

Q. Where are you employed?

A. Globe Wireless, Ltd., 141 Battery Street, San Francisco.

Q. What is your position there?

A. District Manager.

Q. How long have you held that position?

A. Since December, 1946.

Q. How long have you been in the communications industry?

A. 25 years. [854]

* * *

Q. (By Mr. Ernst): During July of 1948 did you participate in some collective bargaining negotiations between the ACA and Globe Wireless?

(Testimony of James B. McPherson.)

A. I did.

Q. And during that time were you one of the representatives [856] of Globe Wireless?

A. I was.

Q. And was one of the issues up in that negotiation the matter of whether Globe would renew a contract for the period from August 15 on?

A. Yes.

Q. And do you recall that you were at a meeting on July 19, 1948, which is referred to in this document marked Respondent's 8 for identification?

A. I was present at that meeting.

Q. And does this document represent the company's report to the employees as to what happened at that meeting?

A. It does.

* * *

Q. (By Mr. Ernst): Mr. McPherson, during the course of these negotiations with the ACA did you attend a meeting in which the employees were apparently represented by ACA men, including some of the employees in the shop, and Mr. Barlow and Mr. Henry [857] Schmidt?

Mr. Berke: I object to that as irrelevant and immaterial, incompetent.

Trial Examiner Ruckel: What is the relevancy of it?

Mr. Ernst: I am just leading up to what was said there about the Communist affidavits.

Trial Examiner Ruckel: How does he know?

Mr. Berke: How material is that?

Trial Examiner Ruckel: I have already ruled that that question——

(Testimony of James B. McPherson.)

Mr. Ernst: Well, I offer to prove, and I will do it not asking a lot of questions, but in one general offer. Is that agreeable?

Trial Examiner Ruckel: That is all right.

Mr. Ernst: I will offer to prove that Mr. McPherson was at this meeting as a representative of Globe Wireless, that the ACA representatives included certain of the employees in the operating room, and Mr. Barlow and one Henry Schmidt, who was an officer of the International Longshoremen's and Warehousemen's Union, CIO, that the question of recognition came up, and the Company advised that it would recognize whoever was certified by the National Labor Relations Board, and the representatives of the Unions, Mr. Schmidt and Mr. Barlow said they would not sign the affidavits, and Mr. Schmidt said, "We do not intend to sign the affidavits now or at any time [858] hereafter."

Q. (By Mr. Ernst): Now, Mr. McPherson, do you recall seeing this document, which I am going to have marked Respondent's next in order?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 15 for identification.)

Trial Examiner Ruckel: Do you want him to tell you what it is?

Mr. Ernst: Pardon me?

Trial Examiner Ruckel: Do you want him to tell you what it is?

Mr. Ernst: Oh, no. I want to ask him whether that was a notice posted on the bulletin board in the

(Testimony of James B. McPherson.)

operating room of Globe Wireless on or about October 21, 1948.

The Witness: It is.

Mr. Ernst: I offer it in evidence, Mr. Examiner.

Mr. Berke: Just a moment. Objected to as irrelevant, immaterial, incompetent, self-serving, no bearing on the issues involved herein. It goes to that portion of defense which was stricken from the record, and which the Trial Examiner heretofore ruled upon.

Mr. Ernst: Mr. Examiner, the notice says, among other things, "Effective immediately the Company will——"

Mr. Berke: Just a moment. I object to counsel reading it.

Mr. Ernst: I can certainly state my argument at this time, [859] and I am going to state it.

Mr. Berke: The Trial Examiner has it now, and he is reading it.

Mr. Ernst: Mr. Examiner, would you ask counsel for General Counsel not to interrupt my argument in the middle of a sentence?

Trial Examiner Ruckel: Well, I can read the instrument if I have the opportunity.

I have read it, I don't see its relevancy. What is its relevancy?

Mr. Ernst: Well, it says in the—1, 2, 3, 4th paragraph that "The Company will discharge, suspend or otherwise discipline any employee it has reason to believe is failing to perform his work properly."

(Testimony of James B. McPherson.)

Mr. Brotsky: Any company will do that.

Trial Examiner Ruckel: Isn't that the prerogative of any employer? I mean, is that something unusual in there?

Mr. Ernst: It further states that when the Globe ACA agreement terminated August 15 the Company adopted the policy, and advised employees that wages, hours and working conditions of the old contract would be maintained until a bargaining agent had been certified by the NLRB. Such a policy was—well, that is not important. And then he goes on to say that the “Sections of the agreement covering wages, sick benefits, vacations and automatic salary increases, based upon Company [860] seniority, shall continue to be recognized by the Company.”

Trial Examiner Ruckel: Yes.

Mr. Ernst: This is in effect an amendment of the old conditions of employment that were set out in the agreement, and this is notice of the conditions under which the employees were to work after that date.

Trial Examiner Ruckel: Well, it may go in for what it is worth.

(The document heretofore marked Respondent's Exhibit No. 15 for identification, was received in evidence.)

* * *

Q. * * * Now, does the telegram, General Counsel's 14, appear to be the telegram sent by you to Mr. Guerrero? A. It does.

(Testimony of James B. McPherson.)

Q. Now after that telegram was sent did Mr. Guerrero telephone you to arrange for a meeting with you to discuss his discharge, [861] and the matter of returning him to work?

Mr. Brotsky: Just a moment. I will submit that the purpose of the call will be shown by the conversation that took place, if there was any call.

Trial Examiner Ruckel: Doesn't the telegram show?

Mr. Ernst: Pardon me?

Trial Examiner Ruckel: Doesn't the telegram—skip it. He may answer.

A. There was no telephone call.

Q. (By Mr. Ernst): Now I want to call your attention to Respondent's Exhibit 14 and ask you to look at the original thereof, and state whether the word "later" was underlined in the copy, or in the original when it was received by you?

A. It was.

Q. Now, calling your attention to General Counsel's Exhibit 12 again, and particularly to the last numbered subparagraph at the end of it, under the heading which says, "This is to advise that:

"3. Whenever necessary, the Company will meet with any employee to discuss subjects relating to his wages, hours and working conditions," and to subdivision 1, which says, "The Company will not—" "not" being underlined—"recognize any shop steward, shop chairman, shop committee, nor any group purporting to represent employees in collective bar-

(Testimony of James B. McPherson.)

gaining unless such representatives are designated in accordance with the [862] National Labor Relations Act."

Now after that notice of November 6th was posted did you have any discussions with respect to your meeting with more than the individual employee?

A. I did.

Q. And can you state with whom you had the discussion?

A. As I recall, Mr. Risley and Mr. Parks.

Q. And about when did the discussion occur?

A. Probably during the latter part of the month of November, or December. I don't recall exactly.

Q. And at that time what request was made of you by either Mr. Risley or Mr. Parks?

A. It was requested that either Mr. Risley or Parks be permitted to accompany the individual who had the grievance.

Q. And what did you reply?

A. I replied that it was not in accordance with the memorandum over the signature of Mr. Brown, which specifically stated that grievances would be limited to the individual.

Q. Did Mr. Risley and Mr. Parks accept that as a final decision?

A. They did not.

Q. What did they ask you to do, or what did you do?

A. They insisted that they had the right, at which time I——

Q. They had the right to what?

(Testimony of James B. McPherson.)

A. To have a representative, at which time I told them if [863] they would excuse me I would consult with our counselor.

Q. And did you do that? A. I did.

Q. And after you had consulted with your counsel what did you tell Mr. Risley and Mr. Parks?

A. I told them even though the memorandum of November the 6th specifically stated that individuals only should present grievances that there would be an exception to that memorandum, and that Mr. Risley or Mr. Parks would be permitted to have a representative. [864]

* * *

Q. Now, Mr. McPherson, about how many people work in the [869] operating room on the three shifts during the entire week, how many individuals are employed there in San Francisco?

Well, let me get it to the relevant point.

How many were employed there in January of 1949?

A. May I ask whether this is confined only to operators, or will it include all personnel within the operating room?

Q. Well, personnel in the operating room, operators, teletype operators, APO's, clerks?

A. In other words, those involved in the handling of hot traffic?

Q. That is right. A. About 29.

Q. And is Mr. Bash in the 29? Did you count him in among the 29?

(Testimony of James B. McPherson.)

A. I did not. As a matter of fact, I didn't count the supervisors either. There would be three extra, making it 32 with the supervisors.

Q. 32, plus Bash, and he would be 33?

A. That is correct.

Q. Now, did Mr. Bash have jurisdiction over anyone other than people within that 32?

A. Only operations personnel.

Q. Would you please answer my question? I asked you whether Mr. Bash had jurisdiction over anyone other than those 32 people? [870]

A. No, sir.

Q. Now, do you in the course of your work go into the operating room? A. I do.

Q. Do you do it daily?

A. I would say probably 6, 8 times a day.

Q. Do you know the 32 employees in the operating room? A. I do.

Q. Do you talk with them yourself?

A. I do.

Q. Do you discuss matters relating to their working conditions with them individually?

Mr. Brotsky: Just a moment. I will object to the relevancy of this.

Trial Examiner Ruckel: Read the question, please.

(Question read.)

Trial Examiner Ruckel: He may answer.

A. I do.

Q. (By Mr. Ernst): Has that been your practice for the last several years? A. It has.

(Testimony of James B. McPherson.)

Q. Do you talk to them in the operating room about those things? A. I do.

Q. Do they come into your office to talk to you about those [871] things?

Mr. Brotsky: Same objection.

Trial Examiner Ruckel: He may answer.

A. They do.

Q. (By Mr. Ernst): Do you recall ever having refused to talk to anybody about such matters?

A. I do not.

* * *

Q. (By Mr. Ernst): Mr. McPherson, does Mr. Bash prepare the watch lists for the operating room?

A. He does.

Q. Do you look them over before they are posted?

A. I do.

Q. Does Mr. Bash handle the questions of the employees with respect to what watch they are working on? A. He does.

Q. Do you do that also?

A. On occasion if it is referred to me, yes.

Q. Do employees come directly to you about their watch assignments [872] from time to time?

Mr. Berke: I object to that. The purpose here of counsel going into this matter is pretty obvious. He says Mr. Bash not only prepares but he is handling those questions.

You are now trying to demonstrate that Mr. Bash doesn't, or at least, it is a minimum.

Trial Examiner Ruckel: Objection sustained.

* * *

(Testimony of James B. McPherson.)

Q. (By Mr. Ernst): Does Mr. Bash handle matters of errors in computation of pay among employees in the operating room?

A. He does. [873]

* * *

Q. Now I would like to call your attention to the period on January 21st beginning at about 4:15, 4:00 or 4:15 in the afternoon, and do you recall that date and time? A. I do.

Q. Did you receive any telephone calls from any of the employees at that time? A. I did. [875]

Q. From whom? A. Mr. Bash.

Q. And would you state at about what time that telephone call came in to you?

A. At approximately 4:15.

Q. And what did Mr. Bash say?

A. Mr. Bash told me that a group of the evening watch operators had left their circuit and had refused to return to their work until such time as Mr. Jones had been reinstated.

Q. What did you then do or say?

A. I told Mr. Bash to do nothing until he heard further from me.

Q. And then what did you do?

A. I immediately went into General Boatwright's office.

Q. Now, did you thereafter give any instructions to Mr. Bash as to what he should do?

A. Immediately thereafter?

Q. Any time thereafter? A. Yes, I did.

(Testimony of James B. McPherson.)

Q. What was the next instructions you gave him?
Take it a bit at a time.

A. All right.

Q. When was it?

A. Approximately at 5:15.

Q. And how did you give him his instructions? [876]

A. By telephone.

Q. What did you tell him to do?

A. I told Mr. Bash that if the—to ask the operators to return to work, Mr. Jones was not going to be reinstated, if they refused to return to work that he was to discharge them.

Q. Now, did you thereafter talk to the group of the employees from the operating room?

A. I did.

Q. Where did you talk to them?

A. In the reception lobby of our general office, Room 652.

Q. How did this meeting come about, what led up to it?

A. I received a telephone call from the PBX Operator informing me that there was a delegation out there that wished to talk to me.

Q. And where were you then?

A. I was in General Boatwright's office. [877]

Q. Where did you go?

A. I went out to meet the group.

Q. I would like to have you, to the best of your recollection, state who said what first?

A. I don't recall the individual who opened the conversation, but one remark that "We have just

(Testimony of James B. McPherson.)

been fired by Mr. Bash, is that right?" And I replied that that was right.

Q. Then what was said?

A. Someone asked the reason.

Q. What did you say in reply?

A. That it was my understanding that they had refused to work until Mr. Jones had been reinstated.

Q. Did you say anything further at that time?

A. I asked them if that was correct.

Mr. Brotsky: When you say "them"—

The Witness: I refer to the group of delegates. It was probably 8, as I recall.

Mr. Brotsky: You weren't addressing anyone particularly?

The Witness: I was speaking to the individual who was speaking to me, I don't recall the name of that person.

Q. (By Mr. Ernst): Was that person apparently acting as spokesman for the group?

A. Apparently so.

Q. Now, what did you then say in addition to asking him whether it was correct, this information that they had been [878] refusing to work?

A. They acknowledged that it was correct, that they did not intend to return to work until Mr. Jones was reinstated.

Q. What did you then say?

A. I didn't reply to that. Someone asked me the reason for Mr. Jones' discharge.

Q. Yes. And what did you say then?

(Testimony of James B. McPherson.)

A. And I replied that the reason was that Mr. Jones was discharged for insubordination.

Q. Now, do you recall what was said in reply exactly to that statement?

A. Someone asked me what I actually meant by "insubordination." I told them that Mr. Jones had been instructed by the chief operator to practice in order to bring his punching speed up equal to what was considered the slowest speed of the other APO operators, and in order to do so he was to return to the Shanghai circuit and practice on company time.

Q. Now, did you tell the employees anything about their work at that time? A. I did not.

Q. Did you tell them that they were fired at that time?

A. I had confirmed that previously, and I again repeated that the entire group should return to their jobs.

Q. Now, who talked to you after that, do you recall?

A. Miss Pottle, as I recall, took the floor at that time. [879]

* * *

Q. (By Mr. Ernst): Well, eventually did Miss Pottle stop talking and you were able to reply?

A. She did.

Q. And what did you say in reply, or what was the general [880] substance of her objection?

A. The general substance was the chief operator.

Q. All right.

(Testimony of James B. McPherson.)

Mr. Berke: She what?

Trial Examiner Ruckel: The chief operator.

Q. (By Mr. Ernst): Now, what did you say in reply to her when she finished?

A. I told Miss Pottle that we were not there for the purpose of discussing the ability or the character of the chief operator, we were there purely for the purpose of determining whether or not they were going to return to their jobs.

Q. Who do you mean "they were going to return"? A. The group that were there.

Q. And what did you tell them then?

A. I told them that they should return to their jobs, if they didn't I had no alternative but to discharge them.

Q. And did they then return?

A. They did not.

Q. Now, up until that time had you told these people that they were fired?

Mr. Brotsky: Just a moment.

Mr. Berke: The witness has already testified that he confirmed the firing, one of the first things he said, because one of the first questions that was addressed to him, if Bash had fired him, he said, [881] "Yes."

Trial Examiner Ruckel: That is my understanding of it.

Q. (By Mr. Ernst): You told them that at the opening of the conversation, is that correct?

A. I did.

Q. Did you tell them that again prior to the time Miss Pottle started to talk?

(Testimony of James B. McPherson.)

A. As I recall, I told them twice after that time.

Q. Once before Miss Pottle talked?

A. Yes.

Q. And then what did the group do?

A. Miss Pottle, I believe——

Q. What did the group do?

A. Oh, the group left. [882]

* * *

Q. (By Mr. Ernst): Now, Mr. McPherson, I would like to refer you to General Counsel's Exhibit 10, and would you say whether that form of notice was sent out with the pay checks of the persons involved in this proceeding? A. It was.

Q. When was that form prepared?

A. As I recall, it would be either Monday or Tuesday of the following week after the discharge of the persons involved.

Q. Did you make any reference to that form when you talked to the employees that were in the ante room in your office and by the telephone operator at 5:15 on Friday afternoon, the 21st?

A. I did not.

Q. Now, did you direct the computation of the pay of the employees involved in this proceeding?

A. I did.

Q. Did Mr. Jones receive a check for his pay?

A. Yes.

Q. Did that include pay for the work that he had done?

Mr. Brotsky: Just a moment.

Mr. Berke: What is the relevancy?

Trial Examiner Ruckel: It is not contended that

(Testimony of James B. McPherson.)

he did [886] not get the pay that was due him?

Mr. Ernst: I think it is extremely material and relevant, Mr. Examiner.

Mr. Berke: We don't take the position he didn't get his pay check, on the contrary he got it.

Mr. Ernst: I am trying to go into the differences in the treatment of the various people involved.

Trial Examiner Ruckel: Of course, he didn't get as much as the others, he didn't work quite as long, did he?

Mr. Ernst: He got more than the others.

Trial Examiner Ruckel: I still don't see the relevancy of it. They might pay him two or three months——

Mr. Ernst: Well, Mr. Examiner, it is simply this: Jones was paid for the work he did, he received two weeks salary in lieu of notice and received accrued vacation pay. The contract with the ACA that was kept in operation by virtue of the notices that were shown required that a person who was discharged should receive two weeks salary or two weeks notice. Jones got it. The contract further provided that any person who was, that is, had his employment terminated for any reason whatsoever, or who quit or left was entitled to accrued vacation pay.

Trial Examiner Ruckel: I will sustain the objection, but what you have just stated to me may stand as an offer of proof. [887]

Mr. Ernst: I further offer to prove that the

(Testimony of James B. McPherson.)

other people all received their pay for the work they did, plus accrued vacation. [888]

* * *

Q. (By Mr. Ernst): Mr. McPherson, during the course of the picketing by the people involved in this proceeding following January 21st, were you present at a meeting in which Mr. Barlow, Secretary of the ACA, Local 9, was discussing with the company the matter of the picketing, and such things?

Mr. Berke: Just a moment. Objected to as incompetent, irrelevant and immaterial.

Trial Examiner Ruckel: Well, it is preliminary. He may answer.

A. I was.

Q. (By Mr. Ernst): Did the question arise then as to whether the ACA was the choice of the majority of the employees in the unit?

Mr. Berke: Just a moment. Object to that as being irrelevant. [889]

Trial Examiner Ruckel: It is still preliminary, I take it. He may answer.

Did the question arise?

A. Yes.

Q. (By Mr. Ernst): It did?

A. Yes.

Q. Did he say as to how you could determine whether they did represent the majority?

Mr. Berke: Is that to be answered "yes" or "no"?

(Testimony of James B. McPherson.)

Mr. Ernst: Yes.

Q. (By Mr. Ernst): Or how did he say it, if he did?

Trial Examiner Ruckel: Well, I don't know whether you are getting down to the material matter or not. What is the difference?

Mr. Ernst: I am going into whether the ACA admitted that—whether or not it represented the majority to be determined by the number of people on the picket line out of the unit, and the ACA did not have a majority at that time.

Mr. Berke: How is that relevant to this proceeding?

Trial Examiner Ruckel: It is not contended they had a majority; in fact, it seemed to show that—I won't say what I was going to say, but it is not in issue, whether they had a majority or not. They might have had a very small minority; the issues would be the same.

Mr. Ernst: Well, I offer to prove that they were not [890] the choice of the majority.

Trial Examiner Ruckel: It is not contended that they were.

Mr. Berke: This isn't an "R" proceeding.

Mr. Ernst: Nothing further.

Trial Examiner Ruckel: There is no refusal to bargain. Sustain an objection to the offer. [891]

* * *

Q. Did Mr. Bash have the authority to recommend with respect to hiring and firing?

(Testimony of James B. McPherson.)

A. He did.

Q. Did he have the authority to suspend employees? A. He did.

Q. On the occasion that 4:00 to mid watch assembled in the lobby, or ante-room to your office, you immediately confirmed the fact, in response to a question, that they had been fired, is that correct?

A. That is correct.

Q. That was before Sylvia Pottle, or any of the others, raised the issue as to the reason for Mr. Jones' discharge, is that correct? A. Correct.

Q. And you later reaffirmed that discharge twice during the period that the group were in that ante-room?

A. At the same time that I offered their jobs back to them, yes.

Q. Yes, but prior to offering their jobs back to them you had confirmed their discharge, had you not? A. I had. [903]

Q. Now, did you tell the group, or anyone in the group that they would get their checks in the mail?

A. I did. [904]

* * *

Q. (By Mr. Brotsky): Well, you had had a policy, that is the company, of discussing grievances prior to November 6th with a shop committee, had you not?

A. That is correct.

Q. And after November 6th that policy changed?

A. Correct.

(Testimony of James B. McPherson.)

Q. However, you did both before and after that time discuss grievances and other matters individually with employees, isn't that so?

Trial Examiner Ruckel: In the presence of a representative.

Q. (By Mr. Brotsky): Yes, in the presence of a representative or alone?

A. No. The thing is in one case they asked for a representative, and he said a representative could come along.

Trial Examiner Ruckel: That is right.

Q. (By Mr. Brotsky): Is that right?

A. That is correct.

Q. And you had posted no bulletin or notice on the company [905] bulletin board prior to January 1st to the effect that you would not see an individual with his representative at that time, had you?

Mr. Ernst: I object to that as irrelevant, whether they put that particular notice up there or not.

Trial Examiner Ruckel: He may answer.

Mr. Brotsky: It goes to the question of policy.

The Witness: May I have that repeated, please?

Trial Examiner Ruckel: Read the question back.

A. I had posted no notice to that effect.

Q. (By Mr. Brotsky): To your knowledge, was any such notice posted by any company official?

A. To the effect that I would not see an individual?

Q. That is correct.

A. The notice of November 6th, as I recall,

(Testimony of James B. McPherson.)

makes reference to grievances being limited to one person.

Q. Then there was no change in that particular policy other than allowing a person to have a representative, is that correct?

A. That is correct. [906]

* * *

Q. (By Mr. Brotsky): Now when you were talking to the group at 5:15 did you direct your remarks particularly to an individual throughout the conversation?

A. I did, and that individual appeared to be the spokesman of the group at the time.

Q. And were there comments made by other members of the group?

A. As I recall, there were comments made among themselves. They weren't loud enough for me to overhear.

Q. Would you say the situation was pretty confused, excited, the people were excited, the situation was confusing?

A. To the best of my recollection, there was one lady only that was really confused.

Mr. Brotsky: That is all I have.

Trial Examiner Ruckel: Any further questions, Mr. Ernst?

Mr. Ernst: I will try to make it extremely quick. [910]

* * *

(Testimony of James B. McPherson.)

Redirect Examination

By Mr. Ernst:

* * *

Q. (By Trial Examiner Ruckel): Now, at the conference with Mr. Andersen and General Boatwright, at which the Jones matter [922] was discussed, was there any discussion there as to the possible activity of the other employees of such a nature as subsequently materialized?

A. No, sir.

Q. The possibility of the others refusing to work or protesting Jones' discharge and what policy the company should take was not discussed?

A. No, sir; it was not.

Q. It was not until Mr. Bash had called you with respect to the evening shift?

A. That is correct, approximately 4:20.

Q. That you then had another conference with Mr. Andersen? A. Yes, sir.

Trial Examiner Ruckel: Further questions?

Recross-Examination

By Mr. Berke:

Q. Was there a discussion on the occasion that you and General Boatwright talked to Mr. Andersen about what the Union might do with respect to the action you might take against Mr. Jones?

A. You are now talking about the one in the morning up in Mr. Andersen's office?

Q. That is right.

A. There was no discussion, no, sir. [923]

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GLOBE WIRELESS, LTD.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled “In the Matter of Globe Wireless, Ltd., and Lorraine E. Conger, Lillie I. Friend, Paul Guerrero, John Gyuresik, Albert E. Hinde, Charles A. Jones, Virginia Kelso, Violet A. Leach, Jesse E. McLin, Homer E. Mulligan, Rudolph W. Niemi, Malcolm G. Parks, Louis Pena, Sylvia Pottle, Bruce E. Risley, George J. Rosengren, David E. Sheaffer, Pauline Smith, Leslie T. Wheeler, Viola H. Williams, Individuals,” the same being known as Case No. 20-CA-193, before said Board, such transcript including the pleadings and testimony and evidence

upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Horace A. Ruckel Trial Examiner for the National Labor Relations Board, dated July 26, 1949.

(2) Stenographic transcript of testimony taken before Trial Examiner Ruckel on July 26, 27, 28, 29, and 30, 1949, together with all exhibits introduced in evidence.

(3) Respondent's telegram, dated August 8, 1949, requesting extension of time for filing brief with the Trial Examiner.

(4) Copy of Acting Chief Trial Examiner's telegram, dated August 9, 1949, granting all parties extension of time for filing briefs.

(5) Respondent's telegram, dated September 3, 1949, requesting further extension of time for filing brief with the Trial Examiner.

(6) Copy of Chief Trial Examiner's telegram, dated September 7, 1949, granting all parties further extension of time for filing briefs.

(7) Respondent's proposed findings of fact and conclusions of law, dated September 16, 1949.

(8) Copy of Trial Examiner Ruckel's Intermediate Report, dated October 28, 1949 (annexed to

item 27 hereof); order transferring case to the Board, dated October 28, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(9) Charging Parties' request for oral argument, dated November 7, 1949. (Denied in Board's Decision and Order dated March 20, 1950, page 1.)

(10) Regional Director's telegram, dated November 16, 1949, requesting extension of time for filing exceptions and brief.

(11) Charging Parties' telegram, dated November 16, 1949, requesting extension of time for filing exceptions to the Intermediate Report.

(12) Copy of Board's telegram, dated November 17, 1949, granting all parties extension of time for filing exceptions and briefs.

(13) Charging Parties' motion to augment record, dated November 22, 1949. (Granted; see Board's Decision and Order, dated March 20, 1950, page 1, footnote 1.)

(14) Respondent's opposition to motion to augment record, received December 8, 1949. (See footnote 1, page 1, of the Board's Decision and Order, dated March 20, 1950.)

(15) Charging Parties' telegram, dated December 8, 1949, requesting further extension of time for filing exceptions and brief pending disposition by Board of motion to augment record.

(16) General Counsel's telegram, dated Decem-

ber 9, 1949, requesting further extension of time for filing exceptions and brief.

(17) Copies of Board's telegrams, dated December 9, 1949, denying requests for further extension of time for filing exceptions and briefs.

(18) Regional Director's telegram, dated December 12, 1949, granting all parties still further extension of time for filing briefs.

(19) Copy of Board's telegram, dated December 12, 1949, granting all parties still further extension of time for filing briefs.

(20) General Counsel's exceptions to the Intermediate Report, received December 12, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(21) Respondent's exceptions to the Intermediate Report, received December 13, 1949.

(22) Charging Parties' exceptions to the Intermediate Report, received December 13, 1949.

(23) Respondent's telegram, dated December 30, 1949, requesting time within which to file a reply brief.

(24) Copy of Board's telegram, dated January 3, 1950, advising all parties that Respondent was granted permission to file a reply brief.

(25) Respondent's telegram, dated January 10, 1950, requesting extension of time for filing reply brief.

(26) Copy of Board's telegram, dated January 11, 1950, granting Respondent extension of time for filing reply brief.

(27) Copy of Decision and Order issued by the National Labor Relations Board on March 20, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 3rd day of November, 1950.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary.

NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 12736. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Globe Wireless, Ltd., Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed November 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY, FILED PURSUANT TO RULE 19 (6)

In this proceeding, petitioner, National Labor Relations Board, hereinafter called the Board, will urge and rely on the following points:

1. Substantial evidence supports the Board's finding that respondent discharged 19 employees for engaging in a strike.

2. The Board's conclusion that respondent by these discharges violated Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended, is valid and proper.

3. Substantial evidence supports the Board's finding that respondent through a supervisory employee made threatening and coercive anti-union statements to several employees.

4. The Board's conclusion that respondent by these statements violated Section 8 (a) (1) of the Act is valid and proper.

5. The Board's procedure in alleging and in proving the aforesaid violations of Section 8 (a) (1) and (3) of the Act was authorized by the Act and was valid and proper.

6. The Board's order is in all respects valid and proper.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations
Board.

Washington, D. C., November 6, 1950.

[Endorsed]: Filed Nov. 10, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Globe Wireless, Ltd., San Francisco, California, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Globe Wireless, Ltd. and Lorraine E. Conger, Lillie I. Friend, Paul Guerrero, John Gyuresik, Albert E. Hinde, Charles A. Jones, Virginia Kelso, Violet A. Leach, Jesse E. McLin, Homer E. Mulligan, Rudolph W. Niemi, Malcolm G. Parks, Louis Pena, Sylvia Pottle, Bruce E. Risley, George J.

Rosengren, David E. Sheaffer, Pauline Smith, Leslie T. Wheeler, Viola H. Williams, Individuals, Case No. 20-CA-193.”

In support of this petition the Board respectfully shows:

(1) Respondent is a Nevada corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on March 20, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the Board hereby orders that the Respondent Globe Wireless, Ltd., San Francisco, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in labor organ-

izations of its employees by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees named in Appendix A, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions,³⁷ and make them whole for any loss of

³⁷In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 NLRB 827.

wages suffered as a result of the discrimination against them, in the matter described in the section above-entitled *The Remedy*;

(b) Post immediately at its office and place of business in San Francisco, California, copies of the notice attached hereto and marked Appendix A.³⁹ Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twentieth Region in writing, within twenty (20) days from the date of receipt of this Order what steps Respondent has taken to comply herewith.

(3) On March 20, 1950, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is cer-

³⁹In the event that this Order is enforced by a decree of a Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

tifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 6th day of November, 1950.

Appendix A

Notice to All Employees

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the amended Act.

We Will Offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them, as set forth in the Decision and Order:

Lorraine E. Conger	Malcolm G. Parks
Lillie I. Friend	Louis Pena
Paul Guerrero	Sylvia Pottle
John Gyuresik	Bruce E. Risley
Albert E. Hinde	George J. Rosengren
Virginia Kelso	David E. Sheaffer
Violet A. Leach	Pauline Smith
Jesse E. McLin	Leslie T. Wheeler
Homer E. Mulligan	Viola H. Williams
Rudolph W. Niemi	

All our employees are free to become or remain members of the above-named union or any other

labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

Dated

GLOBE WIRELESS, LTD.,
(Employer)

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed Nov. 10, 1950.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

The President of the United States of America

To: Globe Wireless, Ltd., 141 Battery Street, San
Francisco, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor

Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 10th day of November, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on March 20, 1950, in a proceeding known upon the records of the said Board as "In the Matter of Globe Wireless, Ltd., and Lorraine E. Conger, et al., individuals, Case No. 20-CA-193," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 10th day of November in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

Marshal's Return on Service attached.

[Endorsed]: Filed Nov. 15, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF MOTION

To: National Labor Relations Board, Petitioner,
and A. Norman Somers, Esq., Assistant General
Counsel, National Labor Relations Board, Its
Attorney:

You and each of you will please take notice that on the 8th day of January, 1951, at the hour of 10:00 o'clock a.m., or as soon thereafter as the parties can be heard, Globe Wireless, Ltd., Respondent above named, will move the above-entitled Court, at its courtroom in the Post Office Building, 7th and Mission Streets, San Francisco, California, for an Order Granting Leave to Adduce Additional Evidence.

Said motion will be based upon this Notice, the Motion attached hereto, the Affidavit attached hereto, Section 10(e) of the National Labor Relations Act, as amended, and the records, papers and files in this proceeding.

Dated: San Francisco, December 10, 1950.

/s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHEGER &
HARRISON,

Counsel for Respondent.

[Title of Court of Appeals and Cause.]

MOTION FOR LEAVE TO ADDUCE
ADDITIONAL TESTIMONY

Comes now Globe Wireless, Ltd., Respondent in the above-entitled proceeding, and respectfully moves the Court for an Order Granting Leave to Produce Additional Evidence.

Facts

This is a proceeding to enforce an Order of the National Labor Relations Board. The Order was issued after hearing based upon unfair labor practice charges filed with the petitioner. The charges were against Respondent, which is engaged in the public utility business of a common carrier of interstate and foreign radio messages for hire, with offices in San Francisco, New York, Honolulu, Manila and Shanghai. The twenty individuals involved in the charge were employed by Respondent in transmitting such radio messages between San Francisco, New York, Honolulu, Manila and Shanghai. The order directed that nineteen of the twenty individuals involved in the charges should be offered reinstatement and each of them made whole for any loss of wages between his abandonment of the strike and the time when he is offered a reinstatement to his former or substantially equivalent position by Respondent.

Respondent, on January 21, 1949, discharged one of its employees, Charles Jones. The Board found

that this discharge was lawful, stating, "Jones admitted having flatly refused to perform certain tasks assigned him during his working time." The discharge of Jones led to a refusal of other employees to perform their work until such time as Jones was reemployed. The Board held, "The trial examiner correctly found that as the strike was in protest against a lawful discharge, it was an economic strike and the Respondent was free to replace such strikers at any time prior to their unconditional request for reinstatement." The Board concluded, however, that the nineteen persons (other than Jones) involved in the proceeding had been "discharged" by Respondent, and therefore Respondent had engaged in an unfair labor practice. The trial examiner had concluded the Respondent's actions with respect to the strikers did not constitute any discrimination in regard to hire or tenure of employment and was not otherwise an unfair labor practice, stating, "It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees." The Board reached a contrary conclusion, stating, "As the Respondent did not attempt to settle the strike or solicit the return of the strikers, we find no basis for concluding, as did the trial examiner, that 'any or all of them could have had their jobs back at any time before they were filled by new employees.'"

The foregoing facts are clearly set forth in the decision of the Board and attached intermediate report of the trial examiner.

During the course of the proceedings before the Board Respondent was denied the opportunity to discover and to introduce evidence. Thus Respondent filed (in accordance with the rules and regulations of the Board and Section 11(1) of the National Labor Relations Act and Section 5(c) of the Administrative Procedure Act), its motion for subpoenas to take depositions before trial of the twenty persons involved in the proceeding; Respondent was denied subpoenas and the opportunity to take depositions. The trial examiner upon motion, struck the 6th, 7th, 8th and 9th defenses of Respondent's answer and Respondent was not permitted to introduce evidence with respect to the defenses; thereafter the Board reached conclusions contrary to the allegations of such defenses. The trial examiner, on numerous occasions, sustained objections to Respondent's attempts to introduce evidence as to a number of issues; thereafter findings with respect to such issues were made by the Board in its decision overruling the trial examiner. In the trial of the case before the trial examiner, there was not a full submission of facts as to whether the jobs of the nineteen persons involved, other than Jones, were available to them at any time, whether the strike had or had not been abandoned and whether or not Respondent had ever failed or refused to return the nineteen strikers to their jobs, either before or after they had been replaced by new permanent employees; the Board, nevertheless, based its order upon assumptions with respect to these issues.

A more complete statement of the facts with respect to each of these will appear below in connection with our statement of the objects of the motion.

The Objects of the Motion and the Basis Thereof

We shall hereafter state the general nature of the evidence that we ask leave to adduce, the materiality of that evidence and the ground for the failure to adduce such evidence before the trial examiner.

1. Evidence excluded but relating to findings of the Board:

(a) The trial examiner concluded that Respondent was under no obligation to reinstate any of the strikers. He found that the strikers were engaged in an economic strike and continued, "It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that Respondent has filled the strikers' jobs with other and permanent employees. In these circumstances, and under familiar decisions of the Board, Respondent is not obligated now to reinstate these strikers." (Tr. Ex. Rep., p. 7, 11. 54-57, p. 8, 11. 1-3). The Board, however, reached a contrary conclusion stating, "As the Respondent did not attempt to settle the strike or solicit the return of the strikers, we find no basis for concluding, as did the Trial Examiner, that 'any or all of them could have had their jobs back at any time before they were filled

by new employee.' " (B.D. & O. p. 4, n. 15.) Based on this finding that the strikers' jobs were not available to them when they were replaced, the Board directed reinstatement of the strikers.

The trial examiner struck Respondent's defenses 7, 8 and 9, which deny any obligation to reinstate the strikers (Tr. 24-28). This ruling was sustained by the Board over the exception of Respondent (Exception III, 2).

There is no evidence in the record supporting the Board's statement that Respondent did not attempt to settle the strike and did not solicit the return of the strikers. Neither is there any evidence in the record that the strikers ever wished to return to work except on the condition that Jones would be returned with them.

Respondent therefore asks this Court to order the Board to take any evidence Respondent may wish to offer to prove that the jobs of the strikers continued available to them up to the time their jobs were filled by new employees and any evidence that Respondent may offer with respect to availability to the strikers of employment with Respondent subsequent to the time that their jobs were filled by new employees; unless the Board amends its decision and order so as to find: "The nineteen strikers were replaced by new permanent employees while they were on economic strike and while their jobs were available to them if they would give up their demand that Jones be reinstated."

(b) The Board reversed the trial examiner's conclusion that there were no unfair labor practices

in the matters covered by the complaint other than the discharge of Jones and the alleged discrimination in the hire and tenure of employment with respect to the other nineteen. In so doing, the Board made findings, contrary to the conclusions of the trial examiner, that Respondent sought to eliminate the ACA* and that an order to cease and desist from in any manner infringing on the rights of employees guaranteed by the Act was necessary to effectuate the policies of the Act because of "Respondent's conduct in the past." Thus the Board made a finding that the ACA was "a union which the Respondent sought to eliminate." (B.O. p. 3, 1. 30). It made certain findings with respect to the effect of statements by Bash, the Chief Operator of the Respondent in its San Francisco office, because of their "context" (B.O. p. 3, 11. 5-23). It also found:

"We are convinced on the record as a whole that the unfair labor practices committed by the Respondent are potentially related to other unfair labor practices prescribed and that danger of their commission in the future is to be anticipated from the Respondent's conduct in the past. In order to make effective the interdependent guarantees of Section 7 and thus

*We use the term ACA to refer to the American Communications Association, a labor organization affiliated with the Congress of Industrial Organizations at the time of the hearing before the trial examiner but which has since been expelled from the CIO in connection with the CIO purge of Communists from its organization.

effectuate the policies of the Act, we shall, accordingly, order the Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act.” (B.D. & O. p. 7, 11. 1-8.)*

The trial examiner, however, refused to permit Respondent to introduce evidence going to these matters and the Board has sustained these rulings. Respondent was denied the opportunity to put in evidence that it was ready to deal with the ACA as soon as it would file the non-Communist affidavits and be certified with the Board (Tr. pp. 455-61; Exc. I, 4). Respondent was prevented from putting in evidence with respect to the intolerable tactics of the ACA contingent among its employees in seeking, by job action and strike activity while remaining on the job, to prevent the company from operating its establishment. (Tr. pp. 258-263). Respondent was denied the opportunity to show that it was ready to meet with the representatives of the strikers at convenient and reasonable times and places to discuss any and all grievances that these persons might have with respect to their conditions of employment (Tr. pp. 201-205, etc.). Respondent was also prohibited from going into the general background of the controversy among its employees

*References to the Board's decision and order are abbreviated B.D. & O.; references to the Reporter's transcript of the proceedings at the hearing before the trial examiner are abbreviated Tr.; references to the trial examiner's intermediate report are abbreviated Tr. Ex. Rep.

as to who should represent them, and Respondent's attempts to meet these problems without a violation of the law in face of the continuous refusal of the ACA to file the non-Communist affidavits and its refusal to accept Respondent's invitation to bargain with it if it represented a majority of its employees (Tr. 406-407, 416-423, 455, 461, 631, 633; see also Exception I, 4; 1, 10; II, 1; II, 6; II, 13; III, 2; III, 5; III, 6). Respondent further was denied the opportunity to prove that the ACA was demanding that it be recognized as the sole and exclusive representative of the employees in the unit appropriate for collective bargaining purposes at a time when the ACA was admitting that it was not the choice of a majority of the employees in such bargaining unit (Tr. pp. 890-891). Respondent's defenses 7, 8 and 9, which go directly to the issues covered by the findings quoted above, were stricken from its answer, and it was not permitted to introduce any evidence with respect thereto (See Exception III, 2, 5, 6).*

Respondent therefore asks this Court to order the Board to take any evidence Respondent may wish to offer to contravene the findings quoted or referred to above unless the Board amends its decision and order by striking such findings therefrom.

(c) The Board found, contrary to the findings of the trial examiner, that "it is necessary to order reinstatement with back pay, as hereinafter provided, in order to effectuate the policies of the Act" (B.D. & O., p. 6, 11. 35-37). The Board also found,

*The portion of Respondent's Answer raising these defenses are appended to this Motion.

contrary to the findings of the trial examiner, "In order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, we shall, accordingly, order the Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act." (B.D. & O., p. 7, 11. 5-8.) In connection therewith the Board referred to *May Department Stores v. Labor Board*, 326 U. S. 376. These findings were made although the trial examiner struck the 7th, 8th and 9th defenses from Respondent's Answer and the Board sustained those rulings (B.D. & O., p. 2, n. 3; Exception III, 2).

Respondent therefore asks this Court to order the Board to take any evidence Respondent may offer with respect to the issues covered by the findings and conclusions quoted and referred to above unless the Board strikes them from its decision and so maintains the position it took when it struck Respondent's defenses 8 and 9 from the Answer.

2. Evidence with respect to conclusions of the Board based on factual issues that were not litigated:

The Board ordered reinstatement of each of the nineteen strikers with back pay from the date of his abandonment of the strike up to the date on which Respondent offered him reinstatement. This is based on an assumption that the strikers abandoned their strike and did so prior to the time that Respondent offered reinstatement. The Board admits in its decision that there is no evidence in the record that the strike has ever been abandoned and, of

course, there can therefore be no basis in the record for a finding that any one of the strikers was not offered reinstatement prior to the time that he abandoned the strike, if he has ever done so.

These issues were not litigated and could not have been litigated in the hearing, for, as the trial examiner found, the strike was continuing at the time of the hearing (Tr. Ex. Rep. p. 7, 1. 56).

Respondent therefore asks this Court to order the Board to take evidence as to whether there has ever been an abandonment of the strike, and, if any evidence be introduced that there has been such abandonment of the strike, to take any evidence Respondent may offer with respect to any offers of reinstatement Respondent may have made to any of the nineteen strikers unless the Board strikes from its decision any reference to an offer of reinstatement as of this time or any time in the future and any reference to back pay.

3. Evidence excluded by denial of subpoenas and opportunity to take depositions before trial:

Prior to the opening of the hearing before the trial examiner, Respondent applied to the Board, in compliance with the rules and regulations of the Board, for subpoenas requiring each of the charging parties to appear and give testimony by deposition upon oral examination for the purpose of discovery and for use as evidence in the proceeding before the Board. These applications were renewed when the hearing opened (Tr. 6-17). The outlined procedure for the taking of the depositions was in accordance with the procedure existing under Rules 26 and 27

of the Federal Rules of Civil Procedure. The applications were denied by the Regional Director and the trial examiner; as a result, Respondent was unable to discover the evidence that it would have discovered through such depositions. In this respect Respondent was not provided due process of law; in this connection it is to be noted that during the trial the General Counsel for the National Labor Relations Board had statements (taken by Board staff) from all of the charging parties, and also from several employees of Respondent.

Respondent therefore asks this Court to order the Board to take any additional evidence that Respondent may discover through the taking of depositions of any or all of the chargeable parties, and Respondent further asks this Court to issue an ancillary Order directing the National Labor Relations Board to make available to counsel for Respondent all statements taken in connection with the investigation of this case and directing the Board to issue subpoenas for the taking of such depositions as are requested by Respondent after consideration of such statements in the hands of the Board.

San Francisco, California, December 10, 1950.

Respectfully submitted,

/s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

BROBECK, PHLEGER &
HARRISON.,

Counsel for Respondent.

Excerpts from Answer of Globe Wireless, Ltd.,
20-CA-193

Sixth Defense

X.

Upon information and belief Respondent alleges that American Communications Association made and filed each and all of the charges upon which the complaint is based.

XI.

Upon information and belief Respondent alleges that said American Communications Association has not complied with the provisions of subsections (f), (g) and (h) of Section 9 of the Act.

Seventh Defense

XII.

Paragraph X of the Sixth Defense is incorporated herein by reference as though set forth in full.

XIII.

Upon information and belief Respondent alleges that any and all concerted activities for the purposes of collective bargaining, mutual aid and protection, or for any other purpose, engaged in by the persons named in Paragraph V of the Complaint while employees of Respondent were and are activities of, for and on behalf of said American Communications Association. Said concerted activities, and any and all concerted activities of said American Communications Association, and the practices of said American Communications Association, its officers and its members, had the intent and the necessary effect of burdening or obstructing com-

merce and impairing the interest of the public in the free flow of interstate commerce in radio telegraphic communication.

XIV.

Respondent alleges that the acts of said American Communications Association, its officers, agents and its members, including those carried on by the persons listed in Paragraph V of the Complaint, have a close intimate and substantial relief to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening or obstructing commerce and the free flow of commerce in violation of the policies of the National Labor Relations Act.

XV.

Upon information and belief respondent alleges that said American Communications Association, its officers and agents and members, including those whose names are listed in paragraph V of the complaint, have by their acts restrained and coerced those employees of Globe Wireless who have chosen not to become members of said American Communications Association, in their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other material aid or protection and in their right to refrain from any or all of such activities.

XVI.

Respondent alleges that said American Communications Association, its officers and agents and

members, including those whose names are listed in paragraph V of the complaint, have attempted to cause respondent to discriminate against those employees who have chosen not to belong to said American Communications Association in regard to hire or tenure of employment and other terms and conditions of employment.

XVII.

Respondent alleges that said American Communications Association, its officers and agents and members, including those whose names are listed in paragraph V of the complaint, have induced or encouraged the employees of other employers to refuse in the course of their employment to handle messages that were or were destined to be handled by respondent or to perform services with respect to messages that were or were destined to be handled by respondent, with the object of forcing or requiring other employers to cease handling such messages and to cease doing business with respondent in accordance with established practices for the joint handling of messages between points served by respondent and points not served by respondent.

Eighth Defense

XVIII.

No relief can be granted to effectuate the policies of the Act on the basis of the complaint.

Ninth Defense

XIX.

Any relief based upon the complaint will contravene the policies of the Act.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF W. P. BOATWRIGHT

State of California,

City and County of San Francisco—ss.

W. P. Boatwright, being first duly sworn, deposes and says:

I am an officer, to wit, the Senior Vice-President of Globe Wireless, Ltd.

The attached two sheets of paper entitled "Globe Wireless Lockout Bulletin Number 3, January 28, 1949," is an excerpt from a bulletin passed out by pickets posted in front of the Globe Wireless, Ltd.'s San Francisco Office on or about January 28, 1949, and there distributed to the public.

I am informed and believe that the American Communications Association, which formerly claimed affiliation with the Congress of Industrial Organization, has been purged from the CIO in pursuance of the CIO policy of eliminating Communist influences from the CIO.

On January 25, 1949, a meeting was held between representatives of Globe Wireless, Ltd. including myself, and a committee of the CIO Labor Council of San Francisco, including the Secretary of the American Communications Association, Mr. Henry Schmidt of the National Longshoremen's & Warehousemen's Union and other CIO officials. This committee claimed to represent the strikers then on strike against Globe Wireless, Ltd. This committee insisted that Globe recognize the American Com-

munications Association as the exclusive representative for bargaining purposes of all employees of Globe in the unit appropriate for collective bargaining purposes including the positions of the strikers. It stated that by counting the number of persons then on strike we could determine the number of persons within that unit who wished the ACA to be so recognized. The committee also requested that Globe agree to a procedure for an election to determine whether or not the ACA should be recognized and asked that such election be held outside of the auspices of the National Labor Relations Board. The terms and conditions under which the strikers would return and the strike be settled were discussed. The committee demanded that Jones be reemployed and that the ACA be recognized as exclusive bargaining agent as the conditions for the return of the strikers to work. Globe's representatives stated that they believed that Jones was discharged for cause and should not be replaced, but agreed to give further consideration to these demands of the strikers.

After the meeting Globe representatives counted the number of persons on strike throughout the collective bargaining unit and determined that a number less than a majority of the employees were on strike and therefore concluded, in view of the statements of the committee, that a majority of the employees in the unit had not designated or selected the American Communications Association as their exclusive representative for collective bargaining purposes.

Globe started to fill the positions of the San Francisco strikers on or before January 22, 1949, and continued thereafter to fill them employing some 12 or more new permanent employees during January, 1949.

Until their positions were filled, Globe Wireless was ready to return to work any one of the persons involved in Case No. 20-CA-193 of the National Labor Relations Board with the exception of Charles A. Jones. Since the strike the following strikers have been reinstated in their positions: Lorraine E. Conger, Lillie I. Friend, Pauline Smith, John Gyuresik, Jesse E. McLin and George J. Rosengren.

/s/ W. P. BOATWRIGHT.

Subscribed and sworn to before me this 10th day of December, 1950.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

Globe Wireless Lock-Out Bulletin No. 3

Jan. 28, 1949

It is now one week since the Dollar Company, Globe Wireless, unfairly fired Chuck Jones and locked-out all of its other workers who dared protest the injustice.

During this first week of the Globe lock-out all of the basic organizational work required to carry on the fight to get our jobs back has been completed.

Now that we have the lock-out machinery established it is up to each of us to keep it moving by contributing the labor required.

Friday found the Publicity Committee mailing out the second in a series of letters to customers. So far the response of Globe customers has been very gratifying. It seems to us that most customers simply will not use a Company that operates with Scab labor and that refuses to correct the great injustice done to us.

CIO Council Meets With Company

The S. F. CIO Council committee which was especially set up to investigate the lock-out and to assist the Globe workers held a meeting with the Dollar Company on Tuesday. The committee thoroughly explored the discharge and sought a basis for return of all workers to their jobs. The Dollar Company officials were non-committal and stated that they would get in touch with the Secretary of the Council after discussing the situation with the

Board of Directors. Up to this time the Company has not got in touch with the Council.

Watch Out for Company Maneuver

Since the company is listening to the most vicious anti-labor union-busting advice that it is possible to buy we would like to warn each locked-out Globe worker to be especially on guard against company tricks designed to wreck the solidarity of the Globe workers. The usual device to be used at this stage of the game is a back-door back-to-work movement. All we need remember is that we all go back together or none. If any official or unofficial approaches are made that is the only answer we need to give them. Also any such move should be immediately reported to headquarters so that any required precautions can be taken.

* * *

Issued by Publicity Committee
Locked-Out Globe-Wireless Workers
240 Golden Gate Avenue.

[Endorsed]: Filed Dec. 11, 1950.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

Statement

The Board has petitioned for enforcement of an order issued against Respondent following the usual proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136; 29 U.S.C. Supp. III, Sec. 151 et seq.). The proceedings were initiated by charges filed, not by a labor organization, but by 20 individual employees of Respondent. The order is based on findings that Respondent discharged for cause one of the complainants, Charles Jones; that the remaining 19 complainants, all of whom were members of the American Communications Association, hereinafter called the ACA, struck in protest against the discharge; and that Respondent immediately discharged all of the strikers for having engaged in the strike. On the basis of these findings the Board concluded first, that the Respondent had interfered with, restrained, and coerced the employees so discharged and in the exercise of the right to engage in concerted activities for mutual aid and protection in violation of Section 8 (a) (1) of the Act; and secondly, that Respondent had discouraged membership in a labor organization by discriminating against the discharged employees in regard to hire and tenure of employment in violation of Section

8 (a) (3) of the Act.¹ The order requires Respondent to cease and desist from the unfair labor practices in which Respondent was found to have engaged, to reinstate the 19 employees found to have been unlawfully discharged with back pay from the date of the abandonment of their strike to the date of Respondent's offer to reinstate them. The order does not require Respondent to recognize or bargain with the ACA.

Respondent has now moved the Court for leave to adduce evidence:-

1. "to prove that the jobs of the strikers continued available to them up to the time their jobs were filled by new employees"; (Motion p. 5.)
2. "with respect to the availability to the strikers of employment with Respondent subsequent to the time their jobs were filled by new employees"; (Motion p. 5.)
3. to prove that Respondent "was ready to deal with the ACA as soon as it would file the non-Communist affidavits [required by Section 9 (h) of the Act] and be certified with Board"; (Motion p. 7.)
4. "with respect to the intolerable tactics of the ACA contingent among its employees in seeking, by job action and strike activity while re-

¹The Board also found that Respondent had violated Section 8 (a) (1) of the Act by making various coercive and threatening statements to its employees.

- maintaining on the job, to prevent the company from operating its establishment"; (Motion p. 7.)
5. to prove that Respondent "was ready to meet with representatives of the strikers at convenient and reasonable times and places to discuss any and all grievances that these persons might have with respect to their conditions of employment"; (Motion p. 7.)
 6. As to "the general background of the controversy among its employees as to who should represent them and Respondent's attempts to meet these problems without a violation of the law in the face of the continuous refusal of the ACA to file the non-Communist affidavits and its refusal to accept Respondent's invitation to bargain with it if it represented a majority of its employees"; (Motion pp. 7-8.)
 7. "to prove that ACA was demanding that it be recognized as the sole and exclusive representative in the unit appropriate for collective bargaining purposes at the time when ACA was admitting that it was not the choice of a majority of the employees in such bargaining;" (Motion p. 8.)
 8. to refute the Board's findings that "it is necessary to order reinstatement with back pay—in order to effectuate the policies of the Act"; and that "In order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act [it is appropriate

to] order the Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act.” (Motion p. 9.)

All of the foregoing items of evidence are claimed by Respondent to be material to the issues attempted to be raised by Respondent’s Seventh, Eighth and Ninth affirmative defenses which were stricken from Respondent’s answer (See Motion pp. 5, 8.)² In these defenses Respondent pleaded that the charges initiating the proceedings before the Board were made and filed by the ACA which had not complied with the requirements of Section 9 (f) (g) and (h) of the Act (Answer, Par. X and XII); and that ACA had engaged in unfair labor practices within the meaning of Sections 8 (b) (1), 8 (b) (2), and 8 (b) (4) A of the Act (Answer, Par. XV, XVI, and XVII).

In addition to asking leave to adduce the foregoing items of evidence Respondent asks the Court to direct the Board first, “to take evidence as to whether there has ever been an abandonment of the strike and if any evidence be introduced that there has been such abandonment of the strike, to take any evidence Respondent may offer with respect to any offer of reinstatement Respondent may

²Contrary to Respondent’s contention, the first two items of proffered evidence, *supra* p. 2 lie wholly outside the issues which Respondent attempted to raise by its Seventh, Eighth and Ninth defenses.

have made to any of the nineteen strikers" (Motion p. 10); second, "to take any additional evidence that Respondent may discover through the taking of depositions of the chargeable [sic] parties" (Motion pp. 11 and 12); and third, "to make available to counsel for Respondent all statements taken in connection with the investigation of this case" and "to issue subpoenas for the taking of such depositions as are requested by Respondent after consideration of such statements in the hands of the Board" (Motion p. 12.)

The Board respectfully submits that consideration of the motion should be deferred until the argument of the case on the merits and that in any event the motion is totally wanting in merit and should be denied.

GEORGE J. BOTT,
General Counsel.

DAVID P. FINDLING,
Associate General Counsel.

A. NORMAN SOMERS,
Assistant General Counsel.

FREDERICK U. REEL,
ALBERT M. DREYER,
Attorneys, National Labor
Relations Board.

December, 1950.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, January 8, 1951.

Before: Healy, Bone and Pope, C. C. J.

[Title of Cause.]

ORDER SUBMITTING AND DENYING MOTION TO ADDUCE ADDITIONAL EVIDENCE

Ordered motion of respondent for order granting leave to adduce additional evidence presented by Mr. Richard Ernst, counsel for respondent, and by Mr. Louis Penfield, Regional Attorney, National Labor Relations Board, counsel for petitioner, and submitted to the court for consideration and decision.

Upon consideration thereof, Further Ordered that said motion be, and hereby is denied, without prejudice to renewal of said motion at the hearing of the cause on the merits.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION

Comes now Globe Wireless, Ltd., Respondent in the above-entitled proceeding, and as its answer to the allegations of the petition for enforcement

filed by the National Labor Relations Board admits, denies and alleges as follows:

I.

Answering paragraph (1) of the petition:

Respondent admits it is a Nevada corporation engaged in business in the State of California, which is within this judicial circuit. It denies that it committed any unfair labor practice in this circuit, or elsewhere, and denies that this Court has jurisdiction of the Board's petition.

II.

Answering paragraph (2) of the petition:

(a) Respondent admits that the Board issued a purported order in the language quoted in paragraph (2) of the Board's petition. It admits that the record certified by the Board as being filed with this Court herein constitutes the entire record of the proceeding before the Board in connection with its Case No. 20-CA-193. It denies that any such proceedings were ever lawfully commenced before the Board or were ever lawfully carried on, and alleges that the Board purported to act with respect to charges made by a labor organization that had failed to comply with Section 9(f), (g) and (h) of the National Labor Relations Act and therefore no complaint lawfully issued, and no procedure ever lawfully began, and that all proceedings with respect to said Case No. 20-CA-193 are without jurisdiction.

(b) Respondent alleges that said purported proceeding was carried on by the Board in an arbitrary and capricious manner in that:

(1) The Board refused to issue subpoenas after proper and timely application therefor was made by Respondent, and that it was entitled to have them issued under Section 11(I) of the Act;

(2) Respondent's application to take depositions for discovery and for evidence in the hearing were denied without reason although the Board was required to order them taken, the application being timely and good cause being shown;

(3) The Board denied Respondent use of any means of discovery in preparation for the hearing, although the General Counsel of the Board was granted and used full and complete means of discovery in preparation for the hearing, such discovery being used with respect to witnesses and evidence useful to Respondent, as well as witnesses and evidence useful to the General Counsel and counsel for the charging parties;

(4) Witnesses were permitted, over the objection of Respondent, to remain in the hearing room and listen to testimony with respect to matters as to which they subsequently testified;

(5) Respondent was denied the opportunity to introduce evidence with respect to defenses incorporated in its answer and numbered therein sixth, seventh, eighth and ninth;

(6) The Board unlawfully enlarged upon the

charge in that it upheld incorporation of an allegation in the complaint (paragraphs III and VI and references thereto in the complaint), took evidence, and made findings and issued part of its order, all with respect to alleged unfair labor practices concerning which no charge was ever filed or a copy thereof served upon Respondent, although the Board is without jurisdiction so to act by virtue of Section 10(b) of the National Labor Relations Act;

(7) The Board made findings of fact with respect to issues not raised in the complaint and on the basis thereof issued an order requiring Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act;

(8) The Board reversed a finding of the Trial Examiner that the jobs of the strikers were available to them after they had been told they were discharged, although no exception to such finding was filed with the Board;

(9) The Board made other findings contrary to and in addition to the findings of the Trial Examiner, although, respectively, no exception was filed with respect to the Trial Examiner's finding or failure to make the finding;

(10) The Board's order against Respondent is based on findings of fact as to which Respondent was denied the opportunity to introduce evidence by rulings of the Trial Examiner sustained by the Board;

(11) The Board's order against Respondent is based on findings of fact having no evidence to support them, and on other findings that are not supported by substantial evidence on the record considered as a whole and that are contrary to the findings of the Trial Examiner;

(12) The Board's order against Respondent is based on assumptions as to which it admits there is no support in the record;

and for these and other reasons Respondent was denied due process of law in violation of the Fifth Amendment to the Constitution.

(c) Respondent denies that the Board duly reached findings of fact and conclusions and thereupon issued the order quoted in paragraph (2) of the petition; and alleges:

(1) The Board's decision and order states in footnote 15 on page 4:

“As the Respondent did not attempt to settle the strike or solicit the return of the strikers, we find no basis for concluding, as did the Trial Examiner, that ‘any or all of them could have had their jobs back at any time before they were filled by new employees.’ ”

although there is no evidence in the record to support the Board's statement preceding the first comma in the above quotation, which is the Board's sole basis for reversing the Trial Examiner's finding quoted; although the Board's finding is con-

trary to the evidence; and although there was no exception to support such reversal of the Trial Examiner's finding quoted.

(2) The Board's statements on page 3 of its decision and order:

that Respondent sought to eliminate the ACA and rid itself of that union; that it warned employees that it intended to discriminate against ACA members, to oust the ACA, to discharge its adherents, and otherwise to interfere with, restrain or coerce employees who chose to adhere to the ACA and participate in its activities;

are based on expressions of views, argument or opinion containing no threat of reprisal or force or promise of benefit, and there is no basis for modifying the Trial Examiner's finding that the expressions were of such character.

(3) The Board's statements referred to in clauses (1) and (2) hereof, and the statements and implications:

that prior to filing the petition in this Court there was a complete severance of relations between Respondent and the 19 strikers so that they were severed with the same finality with which Jones was severed;

that the strike of the 19 employees was "a complete work stoppage" and that the 19 strikers were "discharged because they chose to strike";

the reinstatement with back pay was necessary "in order to effectuate the policies of the Act"; that the alleged unfair labor practices were "potentially related to other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the Respondent's conduct in the past" and that "in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act," the order should direct Respondent "to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act"

are contrary to the fact; are not supported by substantial evidence on the record considered as a whole; and are based on a record in which Respondent was, by rulings of the Trial Examiner sustained by the Board, prevented from submitting material and relevant evidence as to these statements.

(4) The Board's order is based on assumptions, as to which it admits on the face of its decision and order that there is no evidence, that the strike of the 19 strikers has been abandoned and that no offer of their former or substantially equivalent positions was made to any of the 19 prior to his abandonment of the strike. Respondent has received no information justifying its concluding that the strike has been abandoned and it has offered each of the 19 strikers reinstatement in his former or substantially equivalent position, and such offer

has been rejected by each of the 19 strikers who has not been put back to work.

III.

The Board's decision and order is arbitrary, capricious and contrary to law in that the conclusions are without the support required by law:

(a) The conclusion that Respondent discriminated in regard to hire or tenure of employment to encourage membership in a labor organization and interfered with, restrained or coerced employees in the exercise of rights guaranteed in Section 7 of the Act by telling some of them they were discharged, is contrary to law in that each and every one of the 19 strikers could have had his job back at any time before it was filled by a new employee and thereafter had he given up his insistence that Jones be reemployed as a condition of his returning to work, and each knowing this refused to return to work.

(b) The Board's conclusion that Respondent had discriminated in regard to hire or tenure of employment to encourage or discourage membership in a labor organization and had interfered with, restrained or coerced employees in the exercise of rights guaranteed in Section 7 is based on findings contrary to those of the Trial Examiner and that were reached without exception to the contrary finding of the Trial Examiner; that have no evidence in the record to support them; that are contrary to the evidence; that are not supported

by substantial evidence on the record considered as a whole; and that are based on a record in which Respondent was, by rulings of the Trial Examiner, sustained by the Board, prevented from submitting material and relevant evidence. And, furthermore, it is based upon assumptions as to which it appears on the face of the decision and order that there is no evidence.

(c) The conclusion that statements of Bash amounted to violations of Section 8(a) (1) depends on findings that are without evidence to support them; that are not supported by substantial evidence on the record considered as a whole; that are based on a record in which Respondent was, by rulings of the Trial Examiner sustained by the Board, prevented from submitting material and relevant evidence; and that are based entirely on expressions of views, argument or opinion containing no threat of reprisal or force or promise of benefit and found to be of such character by the Trial Examiner.

(d) The conclusion that Respondent be ordered to reinstate the 19 strikers with back pay in order to "effectuate the policies of the Act" is based on a record in which the Board refused to hear evidence as to what affirmative relief would effectuate the policies of the Act; is based on findings contrary to those of the Trial Examiner, although no exception to the Trial Examiner's findings in this respect was filed with the Board; is based on find-

ings that are contrary to the facts and that are not supported by substantial evidence on the record considered as a whole. Said conclusion is contrary to law for the further reasons:

(1) Respondent could have lawfully discharged and refused to reemploy the strikers because their refusals to work were each in violation of non-discriminatory Company rules, the contract of employment, and law.

(2) Respondent could have lawfully discharged and refused to reemploy the strikers because their strike had an unlawful purpose, was in support of unlawful demands, and was carried on in an unlawful manner.

(3) An affirmative order of reinstatement, with or without back pay, would not effectuate the purposes of the Act because it would encourage workers to set up informal labor organizations to engage in wildcat strikes and to disregard established practices for the friendly and peaceful adjustment of industrial disputes and would encourage labor organizations to violate Section 8(b) of the Act.

(e) The conclusion that Respondent be ordered to cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act is based on findings with respect to issues not raised in the complaint or otherwise prior to the issuance of the Board's order; is based on findings contrary to those of the Trial Examiner, although no exception to the Trial Examiner's findings in

this respect was filed with the Board; is based on expressions of views, argument or opinion containing no threat of reprisal or force or promise of benefit; is based on findings that are contrary to the facts, that are not supported by substantial evidence on the record considered as a whole and that are based on a record in which Respondent was, by rulings of the Trial Examiner sustained by the Board, prevented from submitting material and relevant evidence.

IV.

Because of rulings of the Board and the Trial Examiner referred to hereinabove and the procedure adopted in the case, Respondent was prevented from introducing evidence material to the findings, conclusions of law and the order of the Board. Respondent has filed its motion for leave to adduce additional evidence which this Court has denied with leave to renew at this time. Respondent hereby renews said motion and in support thereof alleges that it is prepared to prove, among other things, the follows:

(a) That the statements of Respondent's agents that the 19 strikers were discharged were not unequivocal severances of employment relations between Respondent and the strikers, but were accompanied by invitations to come back to work and give up the demand that Jones be reemployed, which invitations were well-known to the strikers and so placed them in a relation equivalent to that between a striker and the employer. This was dem-

onstrated (1) by negotiations in the January 25, 1949, meeting held between Respondent and collective bargaining representatives of the strikers in which the matter of the return to work of the strikers was thoroughly discussed and in the course of which the strikers advised Respondent that they would not return to work unless Respondent agreed to recognize the ACA as exclusive collective bargaining representative of all of its employees and reinstated Jones, (2) by the admission of the strikers in their picket line bulletins, a copy of one of which being attached to the motion, dated December 10, 1950, and (3) by rehiring of strikers and specific offers of their former or substantially equivalent positions to the strikers after some indication was given that they might be accepted, such offers of reinstatement being made prior to the time the strikers were willing to take their former or substantially equivalent positions without additional "economic strike" concessions.

(b) If the Board can raise the issue of reinstatement and back pay at this late date and without waiving Respondent's position that the Board cannot lawfully issue such an order, that reinstatement with back pay would not effectuate the purposes of the Act and would be contrary to law on the following grounds, among others:

(1) The strikers demanded, as a condition to their returning to work, that Respondent recognize the ACA as exclusive representative for bargaining purposes of all of its employ-

ees in an appropriate unit although they then admitted that the ACA was not the choice of the majority of the employees in such unit;

(2) The strikers engaged in unlawful activities during the strike by participating in, and making their own, acts in violation of Section 8(b) of the National Labor Relations Act and by violating other statutory law.

(3) The activity of the strikers was not protected concerted activity because they had entered into an agreement with Respondent not to engage in such action and they did thereafter plan and carry out a quickie strike in violation of this commitment;

(4) The charges are filed by a labor organization, to wit, the ACA and/or the informal organization constituted by the concerted activities carried on by the strikers, such labor organization being not in compliance with subsections (f), (g) and (h) of Section 9 of the Act when the charges were filed and the complaint purportedly issued.

(c) If the Board can raise the issue of reinstatement and back pay at this late date and without waiving Respondent's position that the Board cannot lawfully issue such an order, that Respondent was acting in good faith and in the belief that it was complying with the National Labor Relations Act throughout the period involved in the proceeding, and was complying with that Act unless only

the law be that the Respondent was required to deal with a non-complying union and refrain from asking it to comply and prove that it was the choice of the majority under the circumstances although it was concurrently promising to bargain with it as soon as there was compliance and a certification; and that all of Respondent's actions taken in view of the problems created by the conflicting demands of labor unions and the refusal of the ACA to comply with the National Labor Relations Act were reasonable, fair and respectful of law under all of the circumstances.

(d) Further evidence to support the conclusion of the Trial Examiner, reversed by the Board, that the statements of Bash, referred to in Part 1 of the Board's decision and order, were all expressions of views, argument or opinion containing no threat of reprisal or force or promise of benefit.

Wherefore, Respondent prays that the Court set aside the Board's order and dismiss its petition for enforcement.

/s/ GREGORY A. HARRISON,

/s/ RICHARD ERNST,

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Attorneys for Respondent.

[Endorsed]: Filed Jan. 18, 1951.

No. 12786

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE WIRELESS, LTD., RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

FILED FOR THE NATIONAL LABOR RELATIONS BOARD

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APR 23 1951

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In the United States Court of Appeals for the Ninth Circuit

No. 12736

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GLOBE WIRELESS, LTD., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 et seq.),¹ for enforcement of its order (R. 78-98) issued on March 20, 1950, against respondent, Globe Wireless, Ltd. The Board's decision and order are reported in 88 N. L. R. B. 1262. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices upon which the order is based having occurred at respondent's place of business in San Francisco, California, within this judicial circuit. Respondent concedes that it is engaged in interstate

¹ The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 43-49.

commerce within the meaning of the Act, and no question as to the Board's jurisdiction is presented (R. 27; 127-128).²

STATEMENT OF THE CASE

Upon charges filed by individual complainants³ the Board issued its complaint, alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act (R. 3-13).⁴ Following the usual proceedings under Section 10 of the Act, the Board rendered its decision and order finding that respondent had violated Sections 8 (a) (1) and (8) (a) (3) of the

² Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

³ Namely, Lorraine E. Conger, Lillie I. Friend, Paul Guerrero, John Gyuresik, Albert E. Hinde, Charles A. Jones, Virginia Kelso, Violet A. Leach, Jesse E. McLin, Homer E. Mulligan, Rudolph W. Niemi, Malcolm G. Parks, Louis Pena, Sylvia Pottle, Bruce E. Risley, George J. Rosengren, David E. Shaeffer, Pauline Smith, Leslie T. Wheeler, Viola H. Williams.

⁴ Although the charges initiating the proceedings were filed by the individual dischargees, respondent in its answer to the complaint (R. 20-22) asserted that the true charging party was the American Communications Association, a labor organization, which had failed to comply with Section 9 (f), (g), and (h) of the Act and had violated Section 8 (b) (1), (2) and 4 (A). The Board held that the Trial Examiner properly struck those defenses. It noted (R. 80, n. 3) that "the provisions of Section 9 (f), (g), and (h) impose no limitation on the filing of charges by individuals, and the fact that the noncomplying union may have assisted members in filing charges is immaterial," citing *Augusta Chemical Co.*, 83 N. L. R. B. 53, subsequently enforced by the Fifth Circuit, 187 F. 2d 63. The Board also observed that "neither noncompliance nor misconduct on the part of the ACA constitutes any defense to the charges here. See *Andrews Company*, 87 N. L. R. B. 379, and *Irwin-Lyons Lumber Co.*, 87 N. L. R. B. 54." The validity of this holding is discussed at pp. 33-37, *infra*.

Act by discharging some 19 employees for having engaged in a lawful economic strike and for being members and active in behalf of a labor organization; and further that respondent had violated Section 8 (a) (1) of the Act by making certain coercive statements to several of its employees (R. 78-91). The order requires respondent to reinstate the discharged employees with back pay; and to cease and desist from interfering with its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and from discouraging membership in labor organizations of its employees by discriminating against them in regard to hire and tenure of employment (R. 91-95).

I. The Board's findings and conclusions

The Board's findings and conclusions and the evidence supporting them may be summarized as follows:

A. The discriminatory discharges

1. *The operators on the afternoon watch*

On January 21, 1949, respondent, a corporation engaged in the transmission of international radio communications, discharged for insubordination Charles E. Jones, an employee who was a member of and active in the American Communications Association, hereinafter referred to as ACA or the Union, a labor organization which had failed to comply with the provisions of Sections 9 (f) (g) and (h) of the Act (R. 26-32, 80).⁵ After his discharge Jones went to

⁵ The Board found that Jones was discharged for insubordination and not because of his union membership or activities, and that his discharge was lawful (R. 83).

a meeting of the ACA scheduled at 1:30 p. m. for members working on the 4 p. m. to midnight watch, (hereinafter referred to as the afternoon watch) (R. 34; 148-149). At this meeting the members voted to protest Jones' discharge (*ibid*). Accordingly, at approximately 4:30 p. m., shortly after the wireless operators on the afternoon watch had come on duty, Jones and Parks, another employee of respondent, proceeded to respondent's operating room where Parks demanded of Bash, respondent's chief operator, that Jones be reinstated (R. 34; 150, 229, 359-361, 339, 657-660). Bash replied that he himself had not discharged Jones (R. 34; 150, 361).⁶ The operators then on duty in the operating room who were members of ACA⁷ gathered around Bash, who told them to go back to their circuits (R. 34; 230, 360). None of them did so (*ibid*).⁸ Bash reported the matter to McPherson, respondent's district manager (R. 34; 361-362, 419). Shortly after 5 p. m., upon orders from McPherson given a few minutes before, Bash again asked each of the operators to return to his circuit (R. 34-35; 154-155, 362-366). Each replied

⁶ According to Parks and the other employees they then "asked to meet with somebody that had authority to reinstate Jones" (R. 229-230).

⁷ Namely, complainants Rudy Niemi, Viola Williams, Bruce Risley, Sylvia Pottle, Pauline Smith, and Al Hinde (R. 228-229, 385-387).

⁸ Between the time Bash directed the operators to return to their circuits and the time (shortly after 5 p. m.) when, as hereinafter related, he told them that they were discharged, the operators remained idle in the operating room awaiting an opportunity to lodge a protest with Bash's superior, McPherson (R. 182-184).

in substance that he would do so only when Jones was reinstated (R. 35; 155, 209, 230-233, 256, 365).⁹ In accordance with McPherson's instructions Bash then told the operators that they were discharged (*ibid*).

The operators thereupon repaired to McPherson's office (R. 35; 156, 197-198, 208-210). McPherson confirmed their discharge but again offered them the opportunity to return to work (R. 35; 189, 422-424, 428). They repeated their demand that Jones be reinstated as a condition to their returning to work and McPherson told them that they were discharged (*ibid.*). The operators thereupon immediately left respondent's premises (R. 157, 248, 394). A few days later each of them received through the mails a final pay check accompanied by a notice of termination of employment (R. 198, 199, 221).¹⁰

2. The operators on the midnight watch

Another meeting of the ACA was held at 8 p. m. on January 21, attended by members of the midnight to 8 a. m. watch (hereinafter referred to as the mid-

⁹ Hinde testified: "I merely stated that I am willing to go back to work but I would rather discuss this grievance first" (R. 274). Parks testified: "We told him we would go back to the circuits when Chuck Jones was reinstated *or a good reason given for his being fired*" (R. 230). [*Italics added.*] Pottle testified to the same effect (R. 220).

¹⁰ The notice read as follows: "*In view of the termination of your employment, we hand you herewith your final pay check covering salary through June 22. This check also includes any accrued vacation pay.*" (R. 199.) [*Italics added.*] This notice was prepared and mailed on the Monday or Tuesday following the discharge of the operators on Friday, January 21, 1949 (R. 424).

night watch), as well as the employees on the afternoon watch who had just been discharged (R. 35; 157-158, 232-234). It was decided that another protest should be lodged with respondent (*ibid.*). In accordance with this decision, Parks, this time accompanied by Albert Hinde, one of the previously discharged operators, approached Bash in respondent's operating room shortly after midnight (R. 35-36; 233-235, 265-266, 283, 344-348, 444-445, 446, 488). Parks repeated the protest against Jones' discharge and Bash answered that the matter was out of his hands (*ibid.*).¹¹ The ACA operators on the midnight watch then on duty left their circuits and joined the group around Bash (R. 35-36; 234, 266, 282-286, 368-369).¹² They made it clear that none of them would return to work until Jones was reinstated (*ibid.*). Upon Bash's failure to give any assurance that Jones would be reinstated, they sat around the operating room as had the group in the afternoon (*ibid.*). About an hour later Bash told them that they were discharged and ordered them to leave the premises, which they did (R. 36; 286, 295-296).

Like the operators who were discharged in the afternoon, those on the midnight shift who were thus discharged received through the mail their final pay checks accompanied by notices of termination of their

¹¹ About 15 minutes after Parks and Hinde arrived at respondent's operating room Bash summoned a building guard and had them ejected from the premises (R. 235, 284, 369).

¹² The operators who joined Parks and Hinde on this occasion were complainants Lorraine Conger, John Gyuresik, Rudy Niemi, Virginia Kelso, John McLin, Homer Mulligan, Louis Pena, Violet Leach, David Shaeffer, and George Rosengren (R. 234, 385-387).

employment (R. 221, 424. See footnote 10, *supra*, p. 5).

3. *The discharge of Guerrero, Wheeler, and Friend*

In addition to the ACA operators on the afternoon and midnight watches, respondent discharged three other ACA operators who were not at work on either January 21 or 22, 1949, namely, complainants Paul Guerrero, Leslie Wheeler and Lillie Friend.

Guerrero: On Saturday evening, January 22, Paul Guerrero, an operator on the 8 a. m. to 4 p. m. watch, had a friend telephone respondent that he could not report for work on Sunday, January 23, because of illness (R. 36; 344-345). When Bash learned that Guerrero had been reported absent because of illness, he telephoned Guerrero and told him to report for work anyway because he (Bash) would not stand for any union tricks (R. 89; 345-346).¹³ Bash testified that he told Guerrero to get a doctor's certificate (R. 89; 376). When Guerrero reported for work at 8 a. m. on Monday, January 24, Bash asked him if he had a doctor's certificate (R. 36-37, 89; 347-348, 378). Guerrero replied that he did not and that he had never before been required to have a doctor's certificate for 1 day's absence because of illness (R. 89; 348). Bash immediately discharged him, saying, "I know you are

¹³ Guerrero testified (R. 346) :

"A. I kept telling him I was sick, I was sick in bed. He says, well, he says, 'I am not going to stand for none of Barlow's tricks, you show up, you come down and show yourself.' I said, 'Hell, I can't help it.'

"Q. Who was this Barlow he referred to?

"A. The Secretary of the Union."

going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it" (R. 89-90; 348, 378, 379).

Wheeler and Friend: Wheeler and Friend were with Guerrero when he was discharged (R. 90; 309, 318). Immediately after he had discharged Guerrero, Bash turned to Wheeler and told him that he was discharged because he had not reported for work the night before (R. 90; 316-320). Before Wheeler could explain his absence, Bash told him to go outside with Guerrero and "try to make him reinstate Chuck Jones, Bruce Risley and company" (R. 90; 320). Bash then ordered Friend to get to work (R. 90; 310). When she began to discuss the various discharges, Bash brusquely told her "to trot along then" (R. 90; 310-311). She then joined Guerrero and Wheeler and all three went down to the picket line which had been established in front of respondent's premises (R. 90; 311).

As in the case of the operators on the afternoon and midnight watches, respondent mailed to Guerrero, Wheeler and Friend notices of the termination of their employment together with their final pay checks (R. 311-312).

4. The Board's rejection of respondent's defenses

Upon the facts set forth above, the Board concluded:

(1) That respondent in violation of Section 8 (a) (1) of the Act had discharged Guerrero, Wheeler, Friend, and the operators of the afternoon and midnight watches because they had engaged in a lawful

concerted activity for mutual aid and protection within the meaning of Section 7 of the Act, and

(2) That by discharging the above mentioned employees respondent had discriminated against them in regard to hire or tenure of employment for the purpose of discouraging membership in a labor organization (namely, the ACA), thereby also violating Section 8 (a) (3) of the Act (R. 84-91). The Board in so doing overruled the Trial Examiner on the one ground on which he had held the discharges to be proper. The Trial Examiner, like the Board, held the strike not to have been caused by unfair labor practices, since, as he and later the Board found, Jones had been discharged for cause (R. 32-34, 83). The Trial Examiner concluded therefrom that the strikers were therefore vulnerable to valid discharge (R. 39). The Board, however, pointed out (R. 84, 85) that while "respondent was free to replace such strikers at any time prior to their unconditional request for reinstatement," respondent was *not* "free to discharge the strikers *before* they had been replaced," and that, therefore, their discharges in advance of their having been replaced was in violation of Section 8 (a) (1) and (3) of the Act, "unless there is merit to the respondent's contention that the strike was for an unlawful purpose or otherwise unprotected." The Board after due consideration concluded that the respondent's contentions to the latter effect were without merit.

Respondent first contended that the strike contravened the Federal Communications Act of 1934 and, therefore, was not a lawful concerted activity protected by Section 7. This contention was based on the

assertion that any work stoppage would cause it to discontinue to furnish services, and that this discontinuance would be a violation of the duty to furnish service imposed by Section 501 of the Federal Communications Act.¹⁴ (See 47 U. S. C. 201, 214.) The Board, however, applying the explicit language of that section, held that if respondent's failure to serve, or abandonment of service were caused by a strike, respondent would not be held to have violated its statutory duty and would not be subject to any penalty (R. 86).

Respondent also urged that the strike violated Section 8 (b) (2) of the Act in that its purpose was to compel respondent to discriminate in favor of Jones because of his activity in and on behalf of the ACA. The Board found and the evidence showed, however, that the strikers believed that Jones had been discriminatorily discharged because of his ACA membership and activities and feared similar reprisals against themselves (R. 213-214, 227, 283). Accordingly, the Board held that there was no basis for the assertion that the strikers were seeking to compel respondent to give preference of employment to the active ACA members and adherents or to permit them to engage in insubordination merely because of their union membership (R. 87-88).

¹⁴ 47 U. S. C. 501: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly permits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction, be punished * * *."

Respondent further argued that the strike was a sit-down strike and therefore not a lawful concerted activity protected by Section 7 of the Act. The Board found and the evidence showed, however, that, while the employees stood around Bash's desk for about an hour discussing Jones' discharge, they left immediately after they were discharged and did not attempt to hold the premises in defiance of the respondent's right of possession (R. 88; 157, 248, 286, 295-296). The Board, therefore, held that the strike was not a sit-down strike (R. 88).

Finally, respondent contended that the strike was illegal and therefore not a lawful concerted activity protected by Section 7 because the strikers violated a nondiscriminatory company rule by stopping work. The rule upon which respondent relied provided that "the Company reserves the right to discharge, suspend, or otherwise discipline any employee it has reason to believe is failing to perform his work properly" (R. 87; 412). But the Board found, as the evidence showed, that the strikers engaged in a complete work stoppage and were discharged because they chose to strike (R. 87, see *supra*, pp. 4-6). The Board, accordingly, held that the rule which respondent sought to invoke had no application to the facts of the case (R. 87).¹⁵

¹⁵ In holding that respondent had violated Section 8 (a) (1) and (3) by discharging the strikers, the Board reversed the Trial Examiner, who held that the employer was free to replace the economic strikers prior to their application for reinstatement. (R. 39). The Board observed that "it does not follow from this [an employer's right to replace economic strikers] that the Respondent was free to discharge the strikers before they had been re-

When the operators on the afternoon watch left McPherson's office at approximately 5:30 p. m. on January 21, Bash followed Sylvia Pottle and Pauline Smith, two of the operators, into the employees' locker room and engaged Pottle in a conversation (R. 40; 210-211, 248-249). In the course of this conversation Bash told Pottle that respondent "just [had] to get rid of the communists," that ACA would never come back into the plant and that if she were "wise" she would get out of the ACA "while the getting is good" (R. 40-42, 82; 211, 249). Bash made statements of similar nature to several other employees. Thus, he told complainants Conger and Shaeffer that "if you are going to tie yourselves to the tail of this Communist kite [meaning the ACA], you can sink with it" (R. 82; 285, 303). He warned Conger that ACA could not do her any good (R. 83; 280), and counselled her to "remember that it's pretty nice to keep eating, you know" (R. 83; 281). Likewise, he told complainant Kelso that respondent wanted the union out of its offices and that it was starting with "guys like Chuck Jones and Bruce Risley and * * * going on down the line" (R. 83; 297).

The Board found that the statements made by Bash to Pottle, Conger, Shaeffer and Kelso interfered with respondent's employees in the exercise of the rights guaranteed them in Section 7 of the Act; placed," (R. 84). It found "no basis for concluding, as did the Trial Examiner, that 'any or all of [the strikers] could have had their jobs back at any time before they were filled by new employees'" (R. 85, n. 15).

that each of the statements contained a threat of reprisal and was not, therefore, protected by Section 8 (c) of the Act;¹⁶ and that by such statements respondent violated Section 8 (a) (1) (R. 83).

The Board overruled respondent's contention that the Board could not lawfully find that respondent had violated Section 8 (a) (1) of the Act on the basis of the threats and coercive statements made by Bash to the several employees because the charges (R. 3-8), unlike the complaint (R. 10, 12), alleged only violations of Sections 8 (a) (1) and (3) by certain discharges and did not contain any allegations of violations of Section 8 (a) (1) by threats and coercive statements. The threats and coercive statements were made at or about the time the employees were discharged in January 1949 (R. 40-42; 211, 249, 280, 285, 297, 303). The charges were filed in April 1949 (R. 7), and the complaint, which alleged violations of Section 8 (a) (1) not only by the discharges referred to in the charges but also by threats and coercive statements, was filed in June 1949 (R. 13). The Board held that a complaint may lawfully enlarge upon a charge so as to allege unfair labor practices in addition to those averred in the charge if the additional unfair labor practices were committed within the 6 months' period preceding the filing of the charge (R. 81).

II. The Board's order

On the basis of the foregoing findings and conclusions the Board entered its order requiring respondent

¹⁶ The Board reversed the Trial Examiner who held that the statements were protected by Section 8 (c) (R. 42).

(a) to cease and desist from discouraging membership in labor organizations of its employees by discriminating against them in regard to their hire or tenure of employment and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act; (b) to offer to each of the complainants, except Jones, full and immediate reinstatement to their former or equivalent positions with back pay from the date of the abandonment of the strike to the date on which respondent offers reinstatement; and (c) to post the usual notices (R. 91-98).¹⁷

QUESTIONS PRESENTED

1. Whether the discharge of employees for striking in protest against the discharge of another employee violates Section 8 (a) (1) and (3) of the Act.

2. Whether the strike in this case violated the Federal Communications Act, or Section 8 (b) (2) of the National Labor Relations Act, as amended, or the employees' contracts of employment.

3. Whether substantial evidence supports the Board's findings that respondent by threatening and coercive statements to its employees violated Section 8 (a) (1) of the Act, and, as a corollary proposition, whether these statements are protected by Section 8 (c) of the Act.

¹⁷ Following entry of the order, the Board petitioned this Court for enforcement thereof. Respondent moved to remand the case for the taking of additional evidence. This motion is discussed *infra*, pp. 29-40.

4. Whether discharged employees who are members of a union which has not complied with Section 9 (f), (g), and (h) of the Act, are precluded from filing individual charges with the Board.

5. Whether the *discharge* of economic strikers prior to their replacement is an unfair labor practice so that evidence as to their *replacement* following their discharge is irrelevant in a proceeding based upon the illegality of the *discharge*.

6. Whether an employer who has discriminatorily discharged individual employees may validly defend his conduct on the ground that the employees were members of a labor organization which likewise violated the Act.

7. Whether evidence as to the amount of back pay due employees is material in proceedings looking to the enforceability of an order based upon their discriminatory discharge.

SUMMARY OF ARGUMENT

1. The employees who struck in protest against Jones' discharge were economic strikers. Respondent by discharging them for that activity violated Section 8 (a) (1) and (3) of the Act. The strike did not contravene any federal law and was not in breach of contract.

2. The threatening and coercive statements of Bash were likewise violative of Section 8 (a) (1). The failure of the charges to allege this aspect of respondent's misconduct did not preclude the Board from alleging the misconduct in its complaint, issued within six months of the commission of the unfair labor practices.

3. Respondent's motion to remand for the taking of additional evidence should be denied. Evidence as to the Union's misconduct or its failure to comply with Section 9 (f), (g), and (h) is not material in the circumstances of this case. Evidence as to the replacement of the strikers *after* their discharge is likewise immaterial, since the unfair labor practice was complete at the time of the discharge. Evidence as to the abandonment of the strike would be relevant in determining the amount of back pay, if any, due the strikers, but is not relevant in this proceeding which is to determine the validity of the Board's order.

ARGUMENT

I. Respondent's discharge of the employees who struck in protest against the dismissal of Jones violated Sections 8 (a) (1) and (3) of the Act

A. A strike to compel the reinstatement of a discharged employee is protected by the Act

The evidence conclusively shows, as the Board found, that each of the 19 employees ordered reinstated was discharged by respondent. Not only were they told orally that they were discharged, but all of them received written notice of the termination of their employment accompanied by their final pay checks, *supra*, pp. 5, 6. Nor does the record leave any room for doubt that the ACA operators on the afternoon and midnight watches were discharged because they chose to strike in protest against the discharge of Jones. Clearly, when they stopped work they did so for that purpose, *supra*, pp. 4-6. They were ordered back to work, and when their demands were not met they chose to strike.

By striking in protest against the discharge of Jones, the operators were engaging in a concerted activity for mutual aid and protection within the meaning of Section 7 of the Act. *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F. 2d 503, 505 (C. A. 2); *Carter Carburetor Corp. v. N. L. R. B.*, 140 F. 2d 714 (C. A. 8). As Judge Learned Hand said in *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolate Co.*, *supra*:

When all other workmen in a shop make common cause with a fellow workman over his separate grievance and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection" although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Therefore, by discharging the operators for engaging in the strike, respondent clearly violated Section 8 (a) (1) of the Act which makes it an unfair labor practice for an employer to interfere with, restrain or coerce his employees in the exercise of the rights guaranteed them in Section 7 of the Act. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B. v. Kennametal Inc.*, 182 F. 2d 817 (C. A. 3); *J. A. Bentley Lumber Co. v. N. L. R. B.*, 180 F. 2d 641 (C. A. 5); *Gullett Gin Co. v. N. L. R. B.*, 179 F. 2d 499 (C. A. 5); *N. L. R. B. v. Peter Cailler Kohler*

Swiss Chocolate Co., 130 F. 2d 503 (C. A. 2); *N. L. R. B. v. Gulf Public Service Co.*, 116 F. 2d 852, 855 (C. A. 5); *N. L. R. B. v. Remington Rand, Inc.*, 130 F. 2d 919, 927, 928 (C. A. 2); *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3), certiorari denied, 308 U. S. 605; see also, *Home Beneficial Life Ins. Co. v. N. L. R. B.*, 159 F. 2d 280, 284-285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B. v. Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied, 332 U. S. 762; *Carter Carburetor Corp. v. N. L. R. B.*, 140 F. 2d 714, 717-718 (C. A. 8). The fact that Jones was discharged for cause and his dismissal was lawful does not in any manner detract from the illegality of respondent's conduct in discharging the strikers, *Firth Carpet Co. v. N. L. R. B.*, 129 F. 2d 633, 635-636 (C. A. 2). While, as the Board found, the strike was an economic strike and respondent was therefore entitled to replace the strikers, (cf. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, *supra*), respondent could not lawfully discharge the strikers before their places had been filled. *N. L. R. B. v. Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2). As the Court of Appeals for the Second Circuit said in the case just cited:

Respondent, by its immediate discharge of the strikers and attempted abnegation of the employment relationship, was guilty of an unfair labor practice. It sought to discharge strikers who, under Section 2 (3) of the Act were still its employees and who were thus entitled to apply for reinstatement or at the very least entitled to reinstatement where their jobs remained unfilled.

Respondent, though it sought to do so, could not deny the right to reinstatement to the striking polishers. Even if there had been no unfair labor practice, respondent could not rely upon its alleged right, if any, to discharge the strikers, because in the instant case, the strikers were discharged without being—or before being—replaced.

Since the operators engaged in a complete work stoppage the doctrine that employees cannot remain at work and at the same time select what part of their allotted tasks they will perform (cf. *N. L. R. B. v. Montgomery Ward & Co.*, 157 F. 2d 486, 496 (C. A. 8)) is inapplicable. *Home Beneficial Life Insurance Co. v. N. L. R. B.*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758.

What has been said in reference to the discharge of the operators on the afternoon and midnight watches is also true with respect to the discharge of Guerrero, Wheeler, and Friend. The record shows beyond question that respondent discharged these employees because it was of the belief that they had joined the strike and made common cause with the strikers (*supra*, pp. 7-8). The fact that respondent may have been mistaken in its belief is immaterial. *N. L. R. B. v. Link Belt Co.*, 311 U. S. 584, 589-590.

By discharging the strikers respondent also violated Section 8 (a) (3) which makes it an unfair labor practice for an employer to discourage membership in a labor organization by discrimination against his employees in regard to hire and tenure of employment. The record makes it clear, as the Board found, that respondent discharged the strikers

not only because they had engaged in a strike but also because they were members of and active in the ACA. Bash's statements to Guerrero and Wheeler at the time he discharged them (*supra*, p. 8), as well as his statements to Pottle, Conger, Shaeffer and Kelso (*supra* pp. 11-12) establish that anti-union animus motivated the discharges. In any event, it is settled law that discharge of union members for engaging in a strike sanctioned by the union constitutes not only a violation of Section 8 (a) (1) but also of Section 8 (a) (3). *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345, 347; *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *Berkshire Knitting Mills v. N. L. R. B.*, 139 F. 2d 134, 140-141 (C. A. 3), certiorari denied, 322 U. S. 747; *N. L. R. B. v. Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), enforcing, 66 N. L. R. B. 930, 931, certiorari denied, 332 U. S. 762; *American Mfg. Co.*, 5 N. L. R. B. 433, enforced, 106 F. 2d 61 (C. A. 2), affirmed, 309 U. S. 629; *Carter Carburetor Corp. v. N. L. R. B.*, 140 F. 2d 714, 718 (C. A. 8); *Western Cartridge Co. v. N. L. R. B.*, 139 F. 2d 855, 858 (C. A. 7); *Home Beneficial Life Ins. Co. v. N. L. R. B.*, 159 F. 2d 280, 284-285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B. v. Remington Rand*, 94 F. 2d 862, 871 (C. A. 2), certiorari denied, 304 U. S. 576; *N. L. R. B. v. Ohio Calcium Co.*, 133 F. 2d 721, 726 (C. A. 6); *N. L. R. B. v. Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 756 (C. A. 6); *N. L. R. B. v. Kennametal Inc.*, 182 F. 2d 817 (C. A. 3).

B. The Board properly concluded that the strike was not illegal

Respondent contended that it was justified in discharging the strikers because the strike was illegal. In support of this contention respondent argued the strike was a sit-down strike and was called in violation of (a) the Federal Communications Act, (b) Section 8 (b) (2) of the National Labor Relations Act, and (c) the strikers' contracts of employment. None of these contentions can be sustained.

The strike was obviously not a sit-down strike. While the strikers on the afternoon and midnight watches remained in respondent's operating room for about an hour after Parks' demands for Jones' reinstatement, they left as soon as they were discharged (*supra*, pp. 5, 6). At no time did they claim to hold the premises in defiance of respondent's right of possession. In these circumstances the contention that the strike was a sit-down strike is wholly wanting in merit. *N. L. R. B. v. American Mfg. Co.*, 106 F. 2d 61, 68 (C. A. 2).

Respondent's contention that the strike contravened the Federal Communications Act is equally untenable. It is true that that statute prohibits respondent as a licensee from abandoning service to any community without first obtaining a certificate from the Federal Communications Commission (47 U. S. C. 214) and that it imposes upon respondent the duty to serve all without discrimination upon reasonable request (47 U. S. C. 201). It is likewise true that Section 501 of the statute makes it unlawful for any person willfully and knowingly to "cause" or "suffer" to

be done anything declared by the statute to be unlawful, or to "cause" or "suffer" to be omitted anything required by the statute (47 U. S. C. 501). But employees by stopping work and withholding their services do not "cause" or "suffer" a licensee to breach its statutory duties any more than a merchant or manufacturer who refuses to furnish the licensee with essential equipment and supplies. It is too clear for argument that neither the employee nor the supplier, who refuses to furnish the licensee with services or goods, as the case may be, "causes" or "suffers" the licensee to breach its statutory duties, although without those essentials it will be impossible for the licensee to meet its statutory obligations. Those obligations are imposed upon the licensee and not upon third parties vested with the lawful right to withhold their services and property.

The Federal Communications Act does not, either expressly or by implication, confer upon a licensee the right to conscript labor or in any manner restrict the right of employees to strike or to quit work singly or in concert.¹⁸ On the other hand the National Labor Relations Act, a later statute, expressly recognizes the right of employees to strike and to engage in concerted activities for their mutual aid and protection. *International Union, etc. v. O'Brien*, 339 U. S. 454. Furthermore, as the Board pointed

¹⁸ This distinguishes the present case from *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, upon which respondent relied in its argument before the Board. The restrictions which the Mutiny Act involved in that case place upon the right of seamen to stop work are not imposed upon employees of licensees under the Federal Communications Act.

out (*supra*, p. 9), the failure of a licensee to perform the obligations prescribed by the Federal Communications would not constitute a breach of such obligations where the failure is caused by a strike.

Like the contention just discussed, respondent's further contention that the strike violated Section 8 (b) (2) of the Act falls of its own weight. The Section invoked by respondent makes it an unfair labor practice for a *labor organization or its agents* to cause or attempt to cause an employer to discriminate *against* an employee in violation of Section 8 (a) (3), which in turn makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in regard to hire and tenure of employment. Respondent argued before the Board that the purpose of the strike was to compel respondent to discriminate in *favor* of Jones, because of his activities in, and on behalf of ACA and was therefore illegal under Section 8 (b) (2).¹⁹ The short answer to this argument is that the Board found, and the uncontradicted evidence conclusively showed, that the employees engaged in the strike because they believed that Jones had been discriminatorily discharged because of his ACA membership and activities and

¹⁹ It is to be noted that the section is directed only against labor organizations and their agents and that employees, as distinguished from the union of which they may be members, cannot be held to be guilty of an unfair labor practice under the section. *International Brotherhood of Electrical Workers v. N. L. R. B.*, 181 F. 2d 34, 39 (C. A. 2), certiorari granted, December 11, 1950; *N. L. R. B. v. National Maritime Union*, 175 F. 2d 686, 692 (C. A. 2), certiorari denied, 338 U. S. 954.

feared similar reprisals against themselves; and that they were not seeking to compel respondent to give preference of employment to ACA members and adherents or to permit them to engage in insubordination merely because of their union membership.

Respondent's final contention as to the illegality of the strike, namely that the employees struck in violation of their contracts of employment, likewise requires but scant discussion. The employees were employed at will. They had not agreed to refrain from striking. The last collective bargaining agreement between ACA and respondent, which contained a no-strike clause, expired in August 1948 and was expressly repudiated by respondent (R. 316, 322, 325). In contending that the strike was in violation of the strikers' contracts of employment, respondent relied solely upon a provision of a notice which respondent had posted in its operating room reading as follows:

The Company reserves the right to discharge, suspend or otherwise discipline any employee it has reason to believe is failing to perform his work properly.

Even assuming that an employer by the mere posting of a notice could incorporate a "no-strike" clause into his employees' unwritten contracts of employment, the notice posted by respondent does not purport to accomplish any such purpose.

Since the Board thus properly rejected respondent's contentions as to the alleged illegality of the strike, it follows under the authorities discussed above, pp. 16-20, that respondent's discharge of the strikers violated Section 8 (a) (1) and (3) of the Act.

II. Substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) by threatening and coercive statements to its employees

As previously related, the Board found and concluded that respondent had violated Section 8 (a) (1) not only by discharging the 19 employees ordered reinstated but also by the threatening and coercive statements made by Bash to Pottle, Conger, Shaeffer, and Kelso; see *supra*, pp. 11-12.²⁰ In so concluding, the Board adopted the finding of the Trial Examiner that the statements were in fact made.²¹ The Board reversed the Trial Examiner's ruling that the statements as a matter of law were within the protection of Section 8 (c) of the Act, holding that each of the statements in question contained a "threat of reprisal" and as such was not within the area permitted under that Section.

We submit that the Board properly found that the statements in question were threatening and coercive. Thus Bash's statement to Pottle that ACA would never come back clearly implied, as the Board found (R. 82), that respondent would resort to any measure necessary to rid itself of the Union. His admonition to get out while the getting was good was an unequivocal warning that respondent intended to discriminate against ACA members, combined with an assurance that if Pottle left

²⁰ Bash was clearly a supervisor within the meaning of Section 2 (11) of the Act (R. 375, 377, 812, 869-870, 903). His conduct in making the statements is therefore imputable to respondent. See *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 599; *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. 2d 780, 786 (C. A. 9).

²¹ Bash's denial of his conversation with Pottle raised an issue of credibility which the Trial Examiner and the Board resolved in favor of Pottle. Cf. *Universal Camera Corp. v. N. L. R. B.*, 71 S. Ct. 456, 465.

the Union her position would be safe. Likewise, his statement to Conger and Shaeffer that "if you are going to tie yourself to the tail of this Communist kite, you can sink with it," was plainly a warning that respondent intended to oust the ACA and discharge its adherents. Similarly his statement to Kelso that respondent wanted the Union out of its offices and that it was starting with "guys like Chuck Jones and Bruce Risley and * * * going on down the line," was a clear warning to Kelso to disavow the Union or, as he stated to other employees, "sink with it." That statements of this nature constitute an unfair labor practice within the meaning of Section 8 (a) (1) of the Act is too well established to require lengthy citation of authorities. *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 477; *Thomas v. Collins*, 323 U. S. 516, 537-538; *N. L. R. B. v. Polson Logging Co.*, 136 F. 2d 314 (C. A. 9); *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. 2d 780 (C. A. 9); *N. L. R. B. v. Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5). It is of no moment that there is no proof that the coercive remarks did actually intimidate respondent's employees. *N. L. R. B. v. Ford*, 170 F. 2d 735, 738 (C. A. 6), *N. L. R. B. v. Winona Textile Mills*, 160 F. 2d 201, 206 (C. A. 8); *Western Cartridge Co. v. N. L. R. B.* 134 F. 2d 240, 244 (C. A. 7); *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7).

Respondent argued before the Board that since each of the charges filed by the several complainants alleged only that respondent had violated Section 8 (a) (1) and (3) by discharging the complainant and did not allege that respondent had violated Section

8 (a) (1) by threats and coercion, the Board could not lawfully include in its complaint an allegation that respondent had violated the Act by making threatening and coercive statements to its employees.

Before consideration is given to this contention, note should be taken of the fact that even if it is correct, the validity of the Board's order will not be affected. The Board found that respondent had violated not only Section 8 (a) (3) but also Section 8 (a) (1) by discharging the strikers (R. 91), and its order directing respondent to cease and desist from violating Section 8 (a) (1) can rest upon that violation alone. The Board's order is therefore valid in its entirety even if the Board was not authorized to include in its complaint an allegation that the threats and coercive statements violated Section 8 (a) (1) (cf. *N. L. R. B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A.4)).

In any case, the contention is without merit. It is well settled that the Board in issuing a complaint is not limited to the violations alleged in the charge. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 367-369, affirming, 104 F. 2d 655, 657 (C. A. 2); *Consumers Power Co. v. N. L. R. B.*, 113 F. 2d 38, 42 (C. A. 6); *N. L. R. B. v. American Creosoting Company*, 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797; *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. 2d 869, 873 (C. A. 7); *N. L. R. B. v. Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71 (C. A. 10); *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413 (C. A. 10). The charge is merely designed to set "in motion the machinery of an in-

quiry" (*N. L. R. B. v. Indiana & Michigan Electric Company*, 318 U. S. 9, 18), and to permit the Board to "enter intelligently upon the exercise of its exploratory powers" (*Consumers Power Co. v. N. L. R. B.*, 113 F. 2d 38, 42 (C. A. 6)). As the Supreme Court declared in the *Indiana & Michigan* case, "the charge does not even serve the purpose of a pleading" (318 U. S. at 18).²²

Respondent before the Board relied upon Section 10 (b) of the Act which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge." Even apart from the fact that this limitations proviso does not preclude the Board from including in the complaint violations not alleged in the charge (see *Cathey Lumber Co.*, 86 N. L. R. B. 157, enforced, 185 F. 2d 1021 (C. A. 5)), the proviso was satisfied in this case since the complaint itself was served within six months of the commission of the unfair labor practices alleged therein. Respondent was thus apprised of the charges against it within the limitations period, and the purpose of the proviso was fully satisfied. See *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 348-349; *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314.

²² Even the complaint does not set the outer limits of the violations which can be proved. Under Section 10 (b) of both the original and the amended Act the complaint "may be amended by the * * * Board in its discretion at any time prior to the issuance of an order based thereon." See *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 224-225; *N. L. R. B. v. American Creosoting Co.*, 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797.

It follows that the Board was authorized to include in its complaint an allegation that respondent had violated Section 8 (a) (1) by other acts and conduct in addition to the discharges. Since the proof established that respondent by Bash's statements, discussed above, violated Section 8 (a) (1) of the Act, the Board's order directing respondent to cease and desist from violating that Section may appropriately rest upon the coercive statements as well as upon respondent's action in discharging employees for engaging in a protected concerted activity.

III. Respondent's motion to adduce additional evidence should be denied

On December 11, 1950, after the filing of the Board's petition for enforcement, respondent moved this Court for an order remanding the case to the Board for the purpose of adducing additional evidence (R. 447-465). This Court on January 8, 1951, denied the motion without prejudice to its renewal at the hearing of the cause on the merits (R. 471). We submit that the motion should now be finally denied.

Respondent in its motion asks leave to adduce additional evidence for the following purposes:

1. "to prove that the jobs of the strikers continued available to them up to the time their jobs were filled by new employees;" (R. 451.)

2. "with respect to the availability to the strikers of employment with Respondent subsequent to the time their jobs were filled by new employees;" (R. 451.)

3. to prove that Respondent "was ready to deal with the ACA as soon as it would file the non-Communist affidavits [required by Section

9 (h) of the Act] and be certified with Board;” (R. 453.)

4. “with respect to the intolerable tactics of the ACA contingent among its employees in seeking, by job action and strike activity while remaining on the job, to prevent the company from operating its establishment;” (R. 453.)

5. to prove that respondent “was ready to meet with representatives of the strikers at convenient and reasonable times and places to discuss any and all grievances that these persons might have with respect to their conditions of employment;” (R. 453.)

6. As to “the general background of the controversy among its employees as to who should represent them and Respondent’s attempts to meet these problems without a violation of the law in the face of the continuous refusal of the ACA to file the non-Communist affidavits and its refusal to accept Respondent’s invitation to bargain with it if it represented a majority of its employees” (R. 453-454.)

7. “to prove that ACA was demanding that it be recognized as the sole and exclusive representative in the unit appropriate for collective bargaining purposes at the time when ACA was admitting that it was not the choice of a majority of the employees in such bargaining;” (R. 454.)

8. to refute the Board’s findings that “it is necessary to order reinstatement with back pay—in order to effectuate the policies of the Act;” and that “In order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act [it is appropriate to] order the Respondent to cease

and desist from in any manner infringing upon the rights of employees guaranteed by the Act.” (R. 454-455.)

All of the foregoing items of evidence are claimed by respondent to be material to the issues attempted to be raised by respondent’s Seventh, Eighth, and Ninth affirmative defenses which were stricken from respondent’s answer. (See R. 451, 454.)²³ In these defenses respondent pleaded that the charges initiating the proceedings before the Board were made and filed by the ACA which had not complied with the requirements of Section 9 (f), (g), and (h) of the Act (R. 20); and that ACA had engaged in unfair labor practices within the meaning of Sections 8 (b) (1), 8 (b) (2), and 8 (b) (4) A of the Act (R. 21-22).

In addition to asking leave to adduce the foregoing items of evidence respondent asks the Court to direct the Board first, “to take evidence as to whether there has ever been an abandonment of the strike and if any evidence be introduced that there has been such abandonment of the strike, to take any evidence respondent may offer with respect to any offer of reinstatement respondent may have made to any of the nineteen strikers” (R. 456); second, “to take any additional evidence that respondent may discover through the taking of depositions of any or all of the chargeable [sic] parties” (R. 457); and third, “to make available to counsel for respondent all statements taken in connection with the investigation of

²³ Contrary to respondent’s contention, the first two items of proffered evidence, *supra*, p. 29, lie wholly outside the issues which respondent attempted to raise by its Seventh, Eighth, and Ninth defenses.

this case” and “to issue subpoenas for the taking of such depositions as are requested by respondent after consideration of such statements in the hands of the Board” (R. 457).

We submit that the motion is without merit and should be denied, because all of the evidence sought to be adduced is plainly irrelevant and immaterial in the present proceeding.

1. Replacement of the strikers

The first two items of evidence which respondent asks leave to adduce (*supra*, p. 29) are offered, as respondent's motion shows (R. 451), for the purpose of proving that, “The nineteen strikers were replaced by new, permanent employees while they were on economic strike and while their jobs were available to them if they would give up their demand that Jones be reinstated.” In the circumstances of this case, the evidence which respondent thus seeks to adduce is plainly irrelevant and immaterial. It is true that both the Board and the Trial Examiner found that the strike was an economic strike and that respondent ordinarily would have the right to replace the strikers. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333. But the Board also found on uncontradicted testimony that respondent discharged all of the strikers immediately upon their going on strike. Not only did respondent's witnesses testify that the strikers were immediately discharged but respondent confirmed their discharge in writing. Respondent did not at the hearing, nor does it now, offer to prove that the strikers were not immediately discharged. Nor did either the Board or the Trial

Examiner exclude any proffered evidence on the subject. When respondent discharged the strikers for having engaged in the strike it committed an unfair labor practice within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act and the fact that it may have thereafter replaced the strikers while the strike was still in progress is wholly immaterial. See p. 18, *supra*.

2. The ACA, its noncompliance with Sections 9 (f), (g), and (h) and alleged misconduct

Except for evidence relating to the abandonment of the strike and respondent's offers, if any, to reinstate the strikers (R. 456), all of the other items of evidence which respondent asks leave to adduce, (namely, items 3 to 8, inclusive, *supra*, pp. 29-30) relate to the ACA, its noncompliance with Sections 9 (f), (g), and (h) and its alleged tortious conduct. This evidence was offered at the hearing before the Trial Examiner in support of the allegations contained in respondent's Seventh, Eighth, and Ninth defenses. (See *supra*, p. 2, n. 4.) These defenses were properly stricken and evidence in support of them properly excluded.

The charges initiating the proceeding were not executed by the ACA but by individual employees. Neither the complaint nor the charges alleged the commission of any unfair labor practices as against the ACA. The only unfair labor practices with which respondent was charged were that it had interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act and had discriminated against its em-

ployees in regard to hire and tenure of employment because of their union activities. No relief was asked either by the complaint or by the charges for the ACA but only for the individual employees. Nor did the Board find that respondent had been guilty of any unfair labor practices insofar as the ACA was concerned or award any relief to that organization.²

Under the Board's order respondent is not required to recognize or bargain with the ACA or to deal with it in any way. In these circumstances, it is manifest that the evidence which respondent asks leave to adduce in respect to the ACA, its failure to meet the requirements of Section 9 (f), (g), and (h), its alleged misconduct, and respondent's dealings with it lies wholly outside the issues of this case.

Sections 9 (f), (g), and (h) deny access to the Board's processes to labor organizations which have failed to comply with their requirements. They do not deny to individuals the right to invoke the Board's jurisdiction for the purpose of obtaining relief for their own benefit and not for the benefit of a noncomplying union. If the charges were filed for the benefit of the ACA, the General Counsel would have promptly dismissed the proceedings. *White v. Douds*, 80 F. Supp. 402 (S. D. N. Y.); *White v. Herzog*, 80 F. Supp. 407 (D. C. D. C.); National Labor Relations Board, Fourteenth Annual Report (Government Printing Office, 1950) pp. 15-16. But no such case

² Contrary to respondent's assertion, the Board made no findings on any issues as to which the Trial Examiner had excluded evidence.

is presented here. No relief was sought for the ACA and none was granted. Evidence as to the noncompliance of the ACA with the requirements of Sections 9 (f), (g), and (h) is therefore irrelevant.

Contentions identical to that advanced by respondent here have recently been rejected by the Courts of Appeals for both the Fifth and Third Circuits. *N. L. R. B. v. Augusta Chemical Co.*, 187 F. 2d 63, ~~2350, 2351~~ (C. A. 5); *N. L. R. B. v. Clausen*, 27 L. R. R. M. 2537, 2540 (C. A. 3). The courts in both cases squarely held that the Board may proceed upon charges made by individual employees even though the employees may be assisted, or even directed, in the making of the charge by a labor organization which is itself ineligible under Section 9 (f), (g), and (h) of the Act to make a valid charge.²⁵

²⁵ As suggested by the Court of Appeals for the Fourth Circuit in *N. L. R. B. v. Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840, 845-846, it may be doubted that an employer has such interest in a union's compliance with Section 9 (f), (g), and (h), as would authorize the employer to raise any question concerning compliance. The object of the filing requirements is to secure for employees and the public the benefits which inure from encouraging operational and financial responsibility of labor organizations (Section 9 (f) and (g), *N. M. U. v. Herzog*, 78 F. Supp. 146, 156-160 (D. of Col., three-judge court), affirmed, 334 U. S. 854), and from minimizing the danger of political strikes (Section 9 (h), *American Communications Association v. Douds*, 339 U. S. 382). The means adopted to achieve this end is the denial of the Board's facilities to a noncomplying labor organization. The opportunity which noncompliance affords an employer to violate the National Labor Relations Act is but an incidental windfall which flows from but is not the legislative purpose behind the method adopted to achieve the general object. Hence, it has none of the aspects of an independent right accorded the employer, and was not intended to have them. Consequently, it would seem that respondent has no standing to raise any question concerning com-

Evidence as to the alleged unfair labor practices in which the ACA is claimed to have engaged, as well as evidence of other misconduct on the part of the ACA, is likewise immaterial. Section 8 (b) of the Act declares certain acts and conduct on the part of labor organizations and their agents to be unfair labor practices. But that section applies only to labor organizations and their agents. It does not apply to members of such organizations.

As Senator Taft explained to the Senate a labor union under the Act is treated as an entity "exactly like a corporation" (93 Daily Cong. Rec. 4142). Consequently, unfair labor practices and other misconduct on the part of a labor organization cannot be imputed to its members merely on the basis of their membership alone, any more than the torts of a corporation can be imputed to its stockholders. 93 Daily Cong. Rec. 4561; *N. L. R. B. v. Ohio Calcium Co.*, 133 F. 2d 721, 726 (C. A. 6); *N. L. R. B. v. Quality Service Laundry*, 131 F. 2d 182, 183 (C. A. 4); *Tyne Company v. N. L. R. B.*, 125 F. 2d 832, 835 (C. A. 5); *Stewart Die Casting Co., v. N. L. R. B.*, 114 F. 2d 849 (C. A. 7), certiorari denied, 312 U. S. 680. Nor does the fact that a labor organization has engaged

pliance because its interest is nothing more "than a general interest in the proper execution of the laws" and does not "rise to the dignity of an interest personal to [it] and not possessed by the people generally." *Stark v. Wickard*, 321 U. S. 288, 304, and cases cited. Cf. also *Grossman v. Young*, 72 F. Supp. 375 (S. D., N. Y.); *Benisch v. Cameron*, 81 F. Supp. 882 (S. D., N. Y.); *Millikan v. Security Trust Co.*, 187 Ind. 307, 118 N. E. 568, 570; *Salina Canyon Coal Co. v. Klemm*, 76 Utah 372, 290 P. 161, 166-167; and *West Texas Utilities Co. v. N. L. R. B.*, 184 F. 2d 233, 239 (C. A. D. C.).

in unfair labor practices or other tortious conduct justify an employer in engaging in unfair labor practices against individual members who have not participated in the misconduct of their union. The evidence which respondent asks leave to adduce relates only to unfair labor practices and other misconduct on the part of the ACA and not to unfair labor practices or other illegal conduct engaged or participated in by the individual employees. It is therefore plainly irrelevant.

3. The abandonment of the strike and respondent's offers of reinstatement

The Board's order requires respondent to reinstate the 19 strikers with back pay from the date of the abandonment of the strike to the date respondent offers to reinstate them. Asserting that there is no evidence in the record on the subject, respondent asks the Court to direct the Board to take evidence as to whether the strike has been abandoned and as to whether respondent has offered to reinstate them. Such evidence is clearly irrelevant in this proceeding. If the strike has not yet been abandoned, then respondent's liability for back pay has not yet accrued. If respondent has offered to reinstate the strikers, then its liability ceased as of the date of the offer. Such being the case, evidence as to the abandonment of the strike and respondent's offer, if any, to reinstate the strikers would become relevant only if a decree of enforcement is entered and subsequent proceedings are brought to compel respondent to comply with the decree. In such subsequent proceedings the evidence which respondent now asks leave to adduce would be relevant. But it is clearly not relevant at

the present stage of the proceeding. Matters which relate only to whether or not the Board's order has been complied with cannot be litigated in proceedings to enforce the order. *N. L. R. B. v. Mexia Textile Mills*, 339 U. S. 563, 567, 569; *N. L. R. B. v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9); *N. L. R. B. v. Bradley Washfountain Co.*, 27 L. R. R. M. 2520 (C. A. 7, decided Mar. 21, 1951).

4. Respondent's alleged right of discovery

In addition to asking leave to adduce additional evidence respondent requests the Court to order the Board to make available to respondent's counsel "all statements taken in connection with the investigation of this case," to permit the respondent to take the depositions of any and all of the complainants and "to issue subpoenas for the taking of such depositions as are requested by respondent after consideration of such statements in the hands of the Board." This request is without shadow of validity on this review. It is obviously not a motion for leave to adduce additional evidence within the meaning of Section 10 (e) or one addressed to any power possessed by a court of review under the National Labor Relations Act or the Administrative Procedure Act. For this reason alone the motion should be denied.

But independently of the foregoing, the motion insofar as it calls for the production of statements and the taking of depositions is plainly without color of merit.

(a) In asking the Court to direct the Board to produce "all statements taken in connection with the investigation of this case," respondent is asking the

Court to substitute itself for the General Counsel and the Board as the tribunal primarily responsible for the conduct of the Board's hearing. The matter of what documents shall be produced and which witnesses shall be called is the responsibility of the General Counsel as an aspect of the conduct of his prosecution of the case. Any statements taken by representatives of the General Counsel in preparing the case are in his custody, and not in the possession of the Board or the Trial Examiner. The case is heard by the Trial Examiner and the Board upon the record presented by the General Counsel and the respondent, and not upon matters in the files of either party. Consequently in asking the Court to direct the Board to produce "all statements taken in connection with the investigation of this case", respondent is asking that the Board be directed to produce matters not in its possession.

If respondent wished the Board or the Trial Examiner to direct the General Counsel to produce any such statements, its request comes too late. Under the Board's Rules and Regulations any such request must be made initially to the Trial Examiner presiding at the hearing and, unless the rules of the Board permit a special appeal from the Trial Examiner before the close of the hearing, is reserved for consideration by the Board on exceptions to the intermediate report;²⁶ it does not become a matter for the cognizance of the Court of Appeals except after adverse ruling by the Board and only in connection with the review of a final order of the Agency. Section 10 (c) of the Act and Section 10 (c) of the

²⁶ Section 203.26 of the Board's Rules and Regulations; 12 Fed. Reg. 5656, 13 Fed. Reg. 4872.

Administrative Procedure Act. Here there was no request made for the production of the statements. Further, the request if made would have been without merit since none of the statements were shown to be material or at variance with testimony given by the persons making them. *Boske v. Comingore*, 177 U. S. 459; *United States v. Ragen*, 180 F. 2d 321, 327 (C. A. 7); *United States v. Krulewitch*, 145 F. 2d 76, 79 (C. A. 2). The demand now made by respondent for the production of the statements cannot therefore be sustained.²⁷

(b) Respondent renews its request, previously denied by the Regional Director and the Trial Examiner, for the taking of depositions of complainants. Nothing in the statute confers any right upon a respondent to take depositions of the charging parties prior to the hearing. At the hearing the Trial Examiner expressly advised respondent that if it desired to take the testimony of any person not present, the Trial Examiner would entertain an application for a subpoena (R. 102). No such application was ever made. Under the circumstances respondent suffered no prejudice from the action of the Board. Cf. *N. L. R. B. v. Ed. Friedrich, Inc.*, 116 F. 2d 888, 889 (C. A. 5). The relevant facts were fully developed at the hearing, and no purpose would now be served in granting respondent's request that the Board take "any additional evidence that respondent *may discover* through the taking of depositions" (R. 457, italics supplied).

²⁷ Section 203.90 of the Board's Rules and Regulations are substantially the same as the regulation involved in the *Boske* and *Ragen* cases.

CONCLUSION

The motion to remand should be denied and the order of the Board should be enforced.

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DAVID P. FINDLING,
Associate General Counsel,

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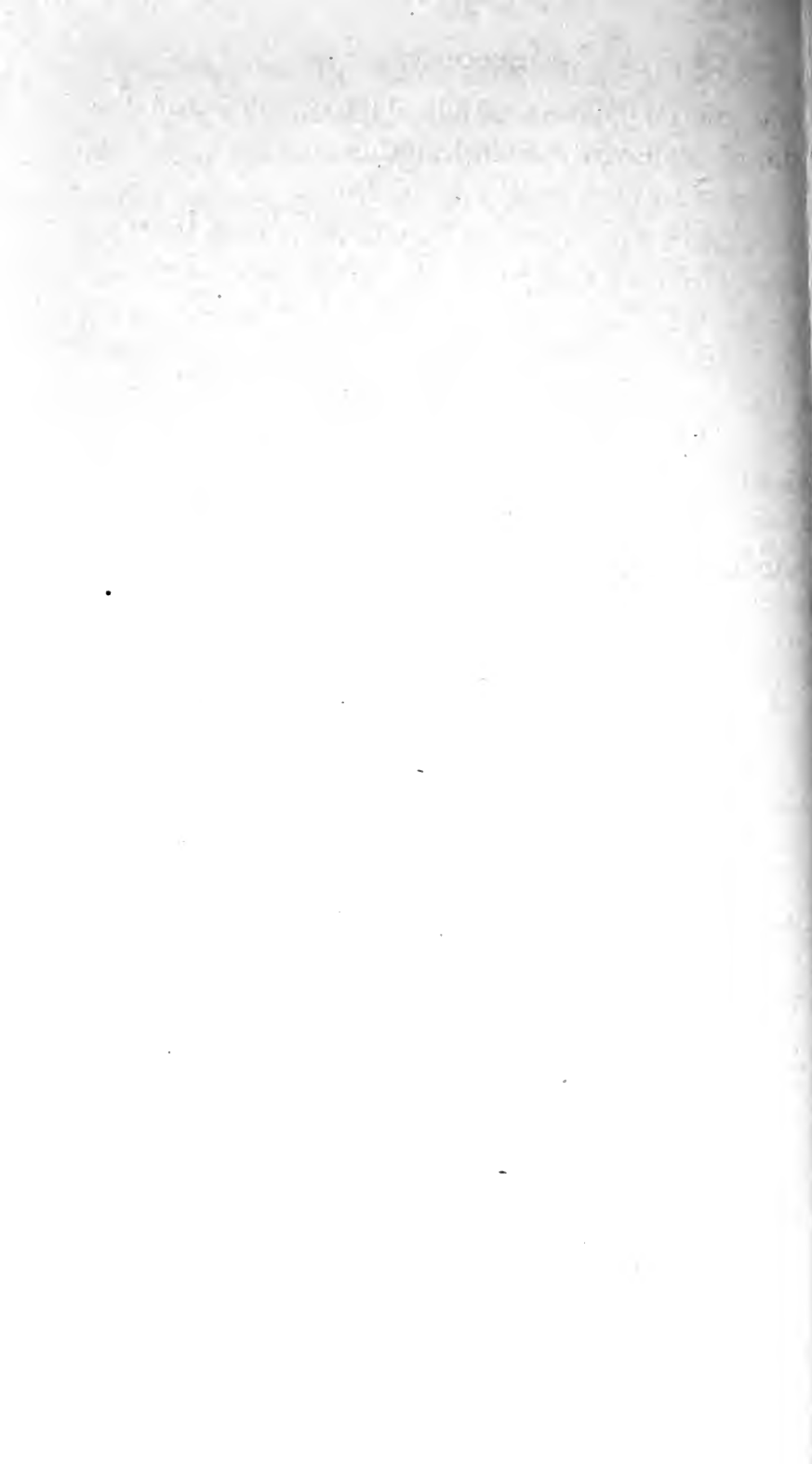
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APRIL 1951.



APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under subsection (c)

of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of the section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constitute unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such years;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization of strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in in-

surance or other benefit plans, and (1) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor

organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. * * * Any such complaint may be amended * * * at anytime prior to the issuance of an order based thereon. * * *

* * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if

all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief, or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection, shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken

before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

The relevant provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 664, 47 U. S. C., secs. 151, *et seq.*) are as follows:

SEC. 201 (a). It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor * * *

* * * * *

SEC. 214 (a). * * * No carrier shall discontinue, reduce, or impair service to a community or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby * * *

* * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term of not more than 2 years, or both.

The first of these is the
 fact that the system is
 not self-sufficient. It
 requires a constant supply
 of raw materials and
 energy. This is a major
 problem for the system
 as a whole. The second
 problem is the fact that
 the system is not
 flexible. It is unable to
 adapt to changing
 conditions. This is a
 major problem for the
 system as a whole. The
 third problem is the fact
 that the system is not
 efficient. It wastes a
 great deal of energy and
 resources. This is a
 major problem for the
 system as a whole.

No. 12,736

IN THE
United States
Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

GLOBE WIRELESS LTD.,

Respondent.

Brief for Respondent Globe Wireless Ltd.

On Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

JUN 29 1951

PAUL F. O'BRIEN,

CLERK

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ated: June 29, 1951.

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IN THE

United States
Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

GLOBE WIRELESS LTD.,

Respondent.

Brief for Respondent Globe Wireless Ltd.

On Petition for Enforcement of an Order of the
National Labor Relations Board

STATEMENT OF THE CASE

The Administrative Proceedings

THE CHARGES AND COMPLAINT.

Nineteen charges were filed with the National Labor Relations Board in the names of 19 individuals by their labor organization.¹ Each alleged that respondent had engaged

¹The Board refused to take evidence that the charges were so pled and struck from respondent's answer the defenses raising this issue. Respondent has applied to this Court for leave to adduce additional evidence proving this fact and has offered so to prove in connection with its application (R. 449, 458).

in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act² in that "on or about January 22, 1949" respondent "discharged" the individual named because of his participation in a strike (R. 5-8). Although the Board was forbidden by Section 9(f), (g) and (h) of the Act from taking any action on such charges, it purported to issue a complaint and commence a proceeding (R. 8-13).³

This complaint alleged that respondent had violated Section 8(a)(3) of the Act by discharging and refusing to reinstate the employees involved herein because of membership in the American Communications Association, a labor organization (hereinafter referred to as the "ACA") and because they were engaged in activities on behalf of the ACA. The complaint further alleged that these same facts constituted an unfair labor practice under Section 8(a)(1). These allegations fully cover the unfair labor practices referred to in the charge. The complaint also alleged that another unfair labor practice, not referred to in the charge, had been committed by virtue of threats of discharge or demotion as a penalty for activity on behalf of ACA (R. 10, 12; paragraphs II, VII).⁴

²By "the Act" we refer to the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §§ 151 et seq. We shall cite it throughout simply by the section number of the Act, omitting Code section numbers.

³Respondent urges that the Board has no jurisdiction to issue an order on the basis of such a proceeding (R. 472). The objection to the Board's jurisdiction has been saved throughout (R. 20—Answer to complaint; R. 61—Exceptions to Intermediate Report; R. 449—Motion to Adduce Evidence; R. 472—Answer to petition here).

⁴Respondent urges that it was error to give any consideration to this alleged unfair labor practice (R. 473-474).

Respondent, after being served with the complaint, sought to follow usual discovery methods under the Federal Rules of Civil Procedure and to obtain subpoenas ancillary thereto, duly applying therefor as provided in Section 11(1) of the Act (R. 103-119). Respondent was denied the use of discovery both before trial (R. 120, 122) and when request therefor was renewed at the commencement of the hearing (R. 99-102).⁵

Respondent filed its answer and four of its defenses were stricken (R. 125-27). During the hearing these rulings were in substance repeated when evidence relating to them was excluded.⁶ (R. 184-186, 200-204, 240-241, 277-278, 341, 400, 402, 425-427)

THE INTERMEDIATE REPORT.

The Trial Examiner who heard the testimony and observed the witnesses issued an intermediate report (R. 24 et seq.) holding that respondent had engaged in no unfair labor practice. He found that the persons involved in this petition had gone on strike to obtain the reemployment of Jones, an employee lawfully discharged for cause (R. 39). He found that respondent was therefore entitled to replace these employees at any time while on strike because theirs was an "economic strike." He further found: "It is clear

⁵Respondent asserts it was denied due process in this and other ways (R. 473-475). Its request was renewed by exceptions to the Trial Examiner's report (R. 61) placing the issues before the Board, and by application in this Court for the taking of additional evidence (R. 456-57).

⁶Respondent urges this to be error (R. 473, 479-484). The necessary exceptions were taken to the Trial Examiner's report (R. 61) to place the issues before the Board. Respondent has applied to this Court for leave to take additional evidence and has made appropriate offers of proof (R. 481-484). These actions establish respondent's right to make the facts a part of the record here (R. 449, 456-60). From time to time hereinafter we shall refer to facts that were excluded by virtue of such rulings.

that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers' jobs with other and permanent employees." (R. 39). He also found that Leo Bash, chief operator of respondent in charge of 32 employees (R. 417), had made certain statements regarding the ACA and that none of them constituted or implied "a threat of reprisal or force or promise of benefit" (R. 42). On the basis of this finding as to the character and effect of the statements, he necessarily concluded, under Section 8(c) of the Act, that these statements did not constitute, and were not evidence of, any unfair labor practice.

The Board's general counsel filed exceptions to findings of the Trial Examiner (R. 63, et seq.). He excepted to the finding that "any or all of the charging parties could have had their jobs back at any time before they were filled by new employees" solely on the ground that they "could only have [had] their jobs back if they abandoned their rights under the Act" to refuse to work until Jones was reinstated (R. 75). The general counsel also excepted to the Trial Examiner's finding that Bash's statements neither constituted nor implied any threat of reprisal or force or promise of benefit (R. 76).

THE BOARD'S DECISION.

Thereafter the Board issued its decision and order (R. 78 et seq.). It reversed these two findings of the Trial Examiner and based its order on these reversals (R. 81-85, 91-93).

The Board agreed, with respect to the strike action, that the strike was an economic strike, and that respondent was free to replace the strikers at any time prior to their unconditional request for reinstatement (R. 84). This holding sustained respondent's right to condition the return of the strikers on their abandoning the demand that Jones be reemployed and so disposed of the general counsel's exception to the finding that the employees could have had their jobs back at any time. Nevertheless the Board went beyond the exception and reversed that finding. It concluded that the strikers, in addition to being told they were discharged, were deprived of any possibility of having their jobs back before they were replaced by new employees (R. 84, 85). On the basis of this reversal of the Trial Examiner's finding, the Board concluded that respondent had violated Sections 8(a)(1) and 8(a)(3).⁷ The Board made no finding even suggesting that the alleged discharges caused or prolonged the strike, or indeed that the unfair practice, if such it was, had any effect whatever on the strikers. The Board also rejected or ignored alternative defenses of respondent, some of which asserted that under all the circumstances respondent could have refused to re-employ the strikers if it had so desired.⁸

The Board also reversed the Trial Examiner's findings as to the character and effect of Bash's statements although the Trial Examiner had heard the testimony and observed the witnesses. The Board's reversal was based solely on

⁷Respondent urges that this reversal is not supported by substantial evidence on the record considered as a whole and should be set aside for this reason and because the Board had no authority to review this finding (R. 474, 475-476, 478).

⁸Respondent urges that this error requires denial of enforcement (R. 479-80).

abstract consideration of the statements as if they were violative of the law *per se* and without consideration of the background and the record as a whole.⁹

THE BOARD'S ORDER.

The Board's affirmative order is unusual because it is hypothetical. The Board conceded that it could not find that the strike had been abandoned or that the strikers had ever been denied or had ever even unconditionally requested reinstatement (R. 93). Nevertheless it ordered reinstatement with back pay, reinstatement to be made if the strike had been or should be abandoned and with back pay for the period between any such abandonment and until reinstatement by respondent (R. 92-93).¹⁰ There is no evidence that the strike has ever been abandoned or that respondent has ever refused to reinstate any of the strikers. On the other hand, the record clearly shows that while the strikers were refusing to return to available work, their jobs were filled by new permanent employees (R. 39).

The Board's order further provides that respondent cease and desist from in any manner violating Sections 8(a)(1) and 8(a)(3) of the Act (R. 92-94). This blanket omnibus injunction is without basis in the complaint, the record, or the Board's findings; in contrast, respondent was denied the opportunity to present its defenses to such possible conclusions.¹¹

⁹Thus, the Board based its reversal in each case upon a citation of Board cases rather than upon consideration of the facts in the record (R. 82-83). Respondent urges this was error (R. 474, 476-477, 479).

¹⁰Respondent urges such an order is unlawful and should not be enforced (R. 475, 477-478, 479).

¹¹Respondent urges that this form of order would be erroneous even if the other errors did not exist (R. 474, 475, 456-477, 479-481).

The Facts Before This Court

The findings and conclusions of the Trial Examiner and the Board, the relevant evidence in the record, and the facts covered by respondent's application for leave to adduce additional evidence and its offer of proof may be summarized as follows:

THE STRIKE ACTION.

The Afternoon Watch.

On January 21, 1949 respondent discharged Charles E. Jones for insubordination.¹² Jones was employed as an operator in respondent's San Francisco operating room where respondent was engaged in the transmission of international radio communications. Jones was a member of the ACA and reported his discharge to a meeting of that union held at 1:30 P.M. of that day for members working in the 4:00 P.M. to midnight watch (hereinafter referred to as the "afternoon watch") (R. 34, 148-149). At this meeting the members voted to protest the discharge of Jones by having spokesmen enter the operating room during working hours and having all members of the ACA leave their work in concert and refuse to work until Jones was reemployed, and thereby to prevent the transmission of international radio messages until respondent agreed to reemploy Jones (R. 187-88). Accordingly, Jones and Parks walked into the operating room at approximately 4:30 P.M. Parks spoke to Bash demanding reinstatement of Jones. Bash replied that he himself had not discharged Jones, but that it had been done by higher supervision. The ACA operators then on duty¹³ gathered around Bash. He re-

¹²The Board found this was lawful (R. 83).

¹³Namely, Hinde, Niemi, Pottle, Risley, Smith and Williams.

peatedly and emphatically ordered them to return to their work (R. 195, 196, 202, 208, 229, 360). All said they would not do so until Jones was returned to work (R. 242). They also asked to have a meeting with those responsible for the discharge, since, as they knew, Bash could not effect reinstatement. Bash indicated they could follow their usual practice of calling McPherson, the District Manager, or the Vice President regarding any grievance (R. 168-72, 184-85). In fact, he specifically told them that they should see the Vice President (R. 203). He also offered them the use of the telephone to request a meeting (R. 257, 361). They failed to accept these invitations and continued to demand that Bash reemploy Jones. About a half-hour later Bash received specific instructions to repeat the order to return to work. He thereupon asked each of the operators to return to his circuit (R. 34, 35, 154, 155, 362, 366). Each replied in substance that he would do so only when Jones was reinstated (R. 35, 155, 209, 230, 233, 256, 365). Thereupon Bash told them that they were fired.

This group of strikers then first chose to call upon higher supervision. They walked across the hall to McPherson's outer office and obtained an immediate meeting with McPherson (R. 218-219, 230, 247). They stated that they understood that they had been fired. McPherson confirmed this, stating that this was because they had given an ultimatum they would not work (R. 248, 421). At the same time he offered them the opportunity to return to work and sought to persuade the group as a group to return to work and to explain why Jones was discharged. McPherson repeated the request that the group return to their jobs (R. 422). Pottle, speaking for the group, carried on at some

length¹⁴ demanding that Jones be reinstated as a condition to their returning to work and insisting that Bash be discharged (R. 198, 209). McPherson again told them that their jobs were available and were there for them and that they should go back to work, and that if they were going to remain there and refuse to work he would have no alternative but to fire them (R. 422, 423). They again refused to work and McPherson again said that the Jones case should not affect their work and that he could not accede to their demand for the discharge of Bash and asked them to go back to work and man the circuits (R. 395, 398, 428). At this time spokesmen for the employees asked for their pay checks (R. 210, 232). McPherson replied that their pay checks would be sent to them in the mail within a few days. They thereupon left the premises.

2. The Midnight Watch.

Another meeting of the ACA was held at 8:00 P.M. on January 21. It was attended by members of the midnight watch (the watch from midnight to 8:00 A.M.). Most of the strikers on the afternoon watch were also present. There was a full discussion of what had occurred during the afternoon watch (R. 298, 299). It was decided that the action of the afternoon watch should be repeated during the midnight watch (R. 288-89). Bash had previously talked to several of the employees about their coming to work and they had assured him that they would come to work as usual or would let him know. Nevertheless, they gave no indication to respondent that they would not work out their

¹⁴Disinterested spectators said she was "hollering and screaming" (R. 395) and "talking very loud" (R. 398).

shifts as usual that night and reported and went to work as usual (R. 290, 367).

In accordance with the decision of the ACA meeting, Parks and Hinde entered the operating room during the midnight watch shortly after those who had manned the circuits on the preceding watch had left for home. Parks again demanded that Jones be returned to work and Bash repeated that this was out of his hands (R. 284). All of the operators then at work¹⁵ deserted their circuits and joined Parks (R. 282, 293, 301, 368-370). They stated that their purpose in this was to gain an audience with someone who could reinstate Jones (R. 233, 235), although all agreed that it was unexpected that even Bash would be there that night and all knew that no one would be there to discuss the grievance. They further made it clear that none of them would return to work until Jones was reinstated (R. 36). Bash had Parks and Hinde ejected from the premises. The other workers sat around the operating room for about an hour, as had the group in the afternoon. When it became clear that they would not work, Bash told them they were fired and to leave the premises. They did so (R. 367-70).

3. Guerrero, Wheeler and Friend.

In addition to the 16 strikers referred to above three others are involved in this case, namely, Paul Guerrero, Leslie Wheeler and Lillie Friend.

Guerrero: Paul Guerrero was not due to report to work on Saturday, June 22, but was due Monday morning at

¹⁵Namely, Conger, Gyuresik, Kelso, Leach, Mulligan, McLin, Pena, Rosengren, Sheaffer (R. 293).

3:00 A.M. On Saturday evening he had a friend telephone respondent that he would not report for work on Sunday because of illness (R. 36, 344, 345). After Bash learned that Guerrero was not at work on Sunday, he telephoned Guerrero and asked him the reason for his absence. When Guerrero said he had a cold, Bash said he did not sound sick and did not think he really was sick. Bash then told him to come down to the office and that he would be immediately sent home if he was sick. When he refused to do so, he was told to get a doctor's certificate to cover himself (R. 375, 376). The Trial Examiner found that Guerrero's testimony that he was sick was not credible (R. 37). Guerrero did not come in on Sunday, but reported on Monday morning. Bash asked him if he had the doctor's certificate and Guerrero replied that he did not (R. 36, 37, 347, 348, 378). Bash then told him that he was fired and continued, "I know you are going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it"¹⁶ (R. 89, 90, 348, 378, 379, 389).

Wheeler: Wheeler was off on Friday night and Saturday evening and was due to work at midnight Sunday evening. Earlier in the evening, Bash called him to assure him his job was there and to find out if he was coming to work as usual. Wheeler promised to come in (R. 37, 38, 374). He failed to do so. Instead, he came in around eight o'clock Monday morning, when he was not due to work. He was with Guerrero, and Bash talked to the two of them at the same time. He asked Wheeler why he had not come in. Wheeler gave no explanation; Bash then told him that he

¹⁶The phrase "on the bricks" means "on the picket line."

was discharged for not reporting to work (R. 37, 38, 319). Bash said to him and Gurrero, "I know you are going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it" (R. 378, 379, 389).

Friend: Friend was not scheduled to work on January 21 or 22. Bash called her on the telephone on Sunday night and made it clear to her that her job was there and that he wanted her to come in to work as usual on Monday morning, and she indicated she would. When she arrived she met Guerrero and Wheeler and came into the operating room with them. Bash was apparently very excited and "in a very angry mood" (R. 309); he talked to the three of them for some time. He told Friend that her job was there and that she should go to work (R. 310). There was some discussion and Bash again ordered her to go to work. She did not do so, and Bash said, "Well, trot along then" (R. 311).

Friend, Guerrero and Wheeler went out and joined the picket line.

4. Subsequent Events.

The strikers established a picket line at respondent's office on Monday morning. During the day, Guerrero and Wheeler received telegrams asking them to come to respondent's office and discuss their discharges with the District Manager and telling them that they would be reinstated if there was no basis for discharge. Both ignored the invitation (R. 38, 320-21, 349-50).

On Monday or Tuesday respondent sent each of the strikers a paycheck covering all time worked including

accrued vacation pay. Under the terms of the old agreement with the ACA, which respondent had advised would be continued in effect, such payment was required on every termination of employment (as in case of furlough, layoff, quit, leaving by mutual consent) except only unilateral discharge by the employer. In the latter case a person was required to receive two weeks pay in lieu of two weeks notice. Jones, in contrast to the strikers, received two weeks pay in lieu of notice of discharge.¹⁷

Respondent met during this week with a committee of the San Francisco CIO Council and officials of the ACA, who represented the strikers (R. 426). They demanded that respondent recognize the ACA as exclusive collective bargaining representative of its employees, and that respondent reemploy Jones. These demands set the conditions under which the strikers would return to work (R. 461-464). At the same time, these representatives admitted that the ACA did not represent the majority of the Globe employees in the appropriate unit covering these workers; hence, respondent could not have lawfully acceded to the demands that the strikers were making (R. 427).

The strikers distributed bulletins on the picket line during this week stating that Jones had been discharged and

¹⁷Each employee received a notice stating: "In view of the termination of your employment, we hand you final paycheck covering salary through January 22, 1949. This check also includes any accrued vacation pay."

Such payment was required by California law. Section 209 of the California Labor Code provides: "In the event of any strike, the unpaid wages earned by striking employees shall become due and payable on the next regular pay day, and the payment or settlement thereof shall include all amounts due the striking employees without abatement or reduction. The employer shall return to each striking employee any deposit, money, or other guaranty required by him from the employee for the faithful performance of the duties of the employment."

that they had been locked out. They also stated that they were discussing with the management a basis for the return of all strikers to their jobs (R. 464, 465).¹⁸

Respondent subsequently filled their jobs with new permanent employees, while the strike continued without any unconditional request for reinstatement being made (R. 39, 93).

5. The Crucial Findings in Issue.

On the basis of the foregoing facts, respondent asserts that the finding of the Trial Examiner with respect to these strikers is the only possible finding supported by substantial evidence on the record considered as a whole. The Trial Examiner found and concluded: “* * * the strike of the other employees in protest (to the discharge of Jones) was not an unfair labor practice strike. It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers’ jobs with other and permanent employees. In these circumstances and under familiar decisions of the Board respondent is not obligated now to reinstate the strikers” (R. 39).

¹⁸Respondent dealt with the strikers only as a group; it carefully avoided any direct dealings with individual strikers to get them to disassociate themselves from the striking group. Any such action would have been an unfair labor practice. The Board apparently concluded that respondent’s failure to solicit individual strikers to return to work meant that the strikers could not have returned (R. 85). The facts are quite the contrary: it meant merely that respondent was complying with the law in not endeavoring to break the strike through interference in its continuance.

The Board reached a contrary conclusion. As explained in its Opening Brief (O.B. 11, n. 15), the Board's contrary conclusion depends on its finding: "As the respondent did not attempt to settle the strike or solicit the return of the strikers, we find no basis for concluding, as did the Trial Examiner, that 'any or all of them could have had their jobs back at any time before they were filled by new employees'" (R. 85n).¹⁹

Respondent urges that this finding is without substantial supporting evidence in the record considered as a whole and that, since the finding of the Trial Examiner is the only lawful and supported finding on this point, there is no finding to support any order of reinstatement or back pay.

The Alternative Defenses Regarding the Strikers.

1) THE STRIKERS' OBLIGATIONS TO WORK.

Respondent interposed an alternative defense that reinstatement and back pay are contrary to law because the strikers were under obligations to continue at work at the same time and place they chose to refuse to do so in order to force the reemployment of Jones.²⁰ The Board agreed that

¹⁹Note that this purported "finding" is supported by no reference to any evidence; that no issue had been raised concerning settlement or solicitation to return; that solicitation would have been an unfair labor practice; that Guerrero and Wheeler, whose status was in doubt to the Company, were specifically invited to discuss their return to work; that settlement negotiations were in fact under way; that the Trial Examiner found on the basis of the evidence that the jobs were open.

²⁰Respondent does not urge that its employees have no right to strike. It concedes this right. However, it urges that law imposes certain obligations upon its employees upon their voluntarily taking over a watch. The public interest requires that they stand the watch and transmit messages so that, absent notice to the contrary, the public will get the service upon which it relies. These obligations are violated when they engage in quickie wild cat intermittent work stoppages such as those carried on by the strikers involved in this proceeding.

Section 201 of the Federal Communications Act imposes an obligation on respondent to furnish service; as a common carrier in interstate and foreign commerce it must furnish radio communication service upon reasonable request (R. 86). However, the Board held that this obligation in no way extends to respondent's employees and that refusal to work by its employees does not result in any breach of duty on the part of respondent (R. 86).

But this statute specifically provides that an omission or failure of its employees is an omission or failure of respondent. Thus Section 217 provides:

"The act, omission or failure of any * * * person * * * employed by any common carrier * * * acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier * * *."

This is further implemented by a direct sanction imposed upon the employees implementing respondent's responsibility for the results of their acts. Thus Section 501 provides that "any person who willfully and knowingly *does or causes or suffers to be done* any act, matter or thing in this Act prohibited or declared to be unlawful" is guilty of a felony.

An obligation upon each striker to have worked out the watch that he took over is also imposed by the state law. The California Penal Code, Section 638, provides:

"Every agent, operator, or employee of any telegraph or telephone office, who wilfully refuses or neglects to send any message received at such office for transmission * * * is guilty of a misdemeanor."

The common law of public utilities requires a utility, and the workers engaged in its essential activity, to provide service to the public. E.g., *United Gas Co. v. R. R. Comm'n*, 278 U.S. 300 (1929). Respondent urges that this obligation includes the obligation to continue to supply this service until reasonable notice is given to the public that it will not be available and urges that this requires persons engaged in these services to carry on their work until the public, which relies upon the workers to provide the service, has been given reasonable and adequate notice that service will not be available as usual.

Respondent's employees had worked under a collective bargaining agreement, including a no-strike clause (R. 325). They had continued to work under an understanding that the terms of this agreement would govern their work (R. 11-13). They had specifically recognized that a precipitous work stoppage during which the circuits were not adequately manned was a violation of their contract of employment (R. 325). The employer established nondiscriminatory rules forbidding desertion of work (R. 412).

The Board denied that these workers' right to reinstatement and back pay was at all affected by the provisions of law and contract referred to (R. 85-86) refusing to give any consideration to the differences between the work of these employees and of others.

b) OTHER ATTACKS ON THE AFFIRMATIVE ORDER FOR REINSTATEMENT WITH BACK PAY.

Respondent interposed a defense and sought to introduce evidence to show that any affirmative order would not effectuate the purposes of the Act (R. 23, 126-127).

We have already stated the facts with respect to the obligation to remain at work at the time and place that the refusal to work occurred and the strike technique of intermittent quickie wild cat work stoppages.

The strikers also carried on their strike in an unlawful manner, inducing or encouraging the employees of other employers to refuse, in the course of their employment, to handle messages that were or were destined to be handled by respondent (R. 453). The Board refused to permit respondent to introduce evidence that the strikers as agents of the ACA, as well as the ACA, engaged in such action in the course of the strike. Respondent also sought to show that the strikers, as agents of the ACA, were restraining and coercing the other employees of respondent in their rights guaranteed by the National Labor Relations Act in carrying out their strike. Respondent further sought to show that the strike had an unlawful purpose of requiring respondent to recognize the ACA as the exclusive collective bargaining representative of its workers at a time when it was admitted that the ACA was not the majority choice of the workers in the appropriate unit (R. 454).

Respondent was denied the opportunity to present evidence on these and other matters with respect to the issue raised by its answer that reinstatement or back pay would not effectuate the policies of the Act. The Board refused to hear any evidence on these issues (R. 23, 126-127). Instead, it arbitrarily and capriciously said that its order would effectuate the policies of the Act without any consideration of the facts surrounding this particular industry or case.

B. BASH'S STATEMENTS TO THE STRIKERS.

Leo Bash, chief operator of respondent at the time of the strike, was one of the early members of the ACA and had been one of the martyrs of that Union in the 1934 Mackay strike. Because of his active participation and leadership in that strike, he had been discriminated against by Mackay. *Mackay Radio & Telegraph Co.*, 1 N.L.R.B. 201 (1936). Finally, after long years, he was given reinstatement with back pay as a result of the Supreme Court's decision in the *Mackay* case upholding the National Labor Relations Act and the Board's right to order reinstatement with back pay. *Labor Board v. Mackay Radio Co.*, 304 U.S. 333 (1938).

Subsequently, he was employed by Globe and remained a member of the ACA during that employment and even while he was performing supervisory work, only taking his withdrawal from this union when he became Globe's chief operator (R. 355). He became very disturbed when his union, the ACA, failed to take the necessary action so that non-Communist affidavits could be filed and it could fully comply with the requirements of the amended National Labor Relations Act (R. 371). Consequently, during the period beginning at least in the summer of 1948, the IBEW and the ACA adherents among the Globe employees were at odds and were repeatedly discussing the pros and cons of the ACA and other unions (R. 141, 172-173).

He frequently accused the ACA of being Communist-dominated and accused ACA adherents, among the Globe employees, of being Communists or fellow travelers (R. 141, 194, 211, 262, 381-384). On at least one occasion, exchanges between him and an ACA member were very

heated and almost led to physical violence on the premises (R. 29-30, 141).

The ACA adherents told the Company that Bash "was a raving maniac, and that it was impossible to deal with him in a reasonable way" (R. 175, 209). They said that it was the usual thing for Bash "to be hollering at somebody" (R. 195). One of the strikers told Bash to his face, "Leo, that is the trouble with you, you are so hot headed, you do things before you think" (R. 213). The Trial Examiner found that Bash had made certain statements regarding the ACA, as it was operating at the time of the strike, and the Communists. He found, "The entire record shows Bash to be of an excitable and undiplomatic temperament" (R. 41), and that he had a "willingness to use any stigma to beat a dogma" (R. 42).

On the basis of the entire record, the Examiner found that these statements did not constitute or imply "a threat of reprisal or force or promise of benefit" (R. 42). One of the principal statements that was alleged to constitute a threat of reprisal or force or promise of benefit was made in the course of a telephone conversation that the person then being "threatened" summarized as being an apology by Bash for the action he had taken (R. 214), and one in which there was no suggestion that the striker would obtain any benefit by leaving the group of strikers and coming back to work (R. 220).

The Board reversed the finding of the Examiner (R. 82-83). In doing so, it gave no consideration to the general record and reached its conclusion solely on the basis of the citation of cases and without consideration of the evidence. Thus, the Board stated, "His admonition to get out while

the getting was good was an unequivocal warning that the employer intended to discriminate against ACA members, combined with an assurance that if Pottle left the Union, her position would be safe" (R. 82). The record, however, shows that Pottle, in no way, thought that this statement suggested that she would be secure in her job if she left the ACA (R. 220).

The Board further concluded that these statements of Bash represented the position of the company and that respondent was responsible for these statements (R. 82-83). This finding was made although the strikers had insisted that Bash should be discharged (R. 193-94) and that he was responsible for all of the trouble in the operating room (R. 147, 156), although the statements principally relied on were made in the course of Bash's attempt to justify and apologize for the action he had taken, in the course of which he said that if he had known this would result, he would never have done it, and although Bash was asked to resign and subsequently was demoted between the time of the strike and the time of the hearing (R. 215-16, 380).

Respondent asserts, *if the Board had any jurisdiction to go into any alleged unfair labor practices of the type just discussed*, that this Court must accept the finding of the Trial Examiner that these statements contained no threat of reprisal or force or promise of benefit. It further contends that the Board's contrary conclusion is not a finding of fact, is not supported by substantial evidence on the record considered as a whole and is contrary to such evidence (R. 475-76).

C. THE BOARD'S ORDER.

We have already stated the facts and findings on the basis of which respondent attacks the affirmative order of reinstatement with back pay on the ground that it is contrary to law, both substantively and procedurally.

The order provides that reinstatement with back pay should be granted if certain hypothetical occurrences should take place. On the basis of the findings and conclusions it stated that neither reinstatement nor back pay was proper on the status of the record presented. It ordered reinstatement and back pay, however, should the strikers at some time give up their strike demands and unconditionally seek reinstatement with provision for back pay for any period that might exist between such an abandonment of the strike and the first offer of reinstatement should that be subsequent to the abandonment of the strike (R. 93).

Paragraph 1(b) of the affirmative order provides an omnibus cease and desist order (R. 93-94). However, there is nothing in the charge or the complaint suggesting an allegation that respondent exhibited a general disregard for the provisions of the Act. There are no findings supporting this paragraph.

On the basis of these errors, respondent has filed its Answer praying in the alternative that the Court deny enforcement or remand the case for further evidence before the Board should the record require amplification in accordance with respondent's motion for leave to adduce additional evidence (R. 471 et seq.).

QUESTIONS PRESENTED

(1) Whether there is substantial evidence on the record considered as a whole supporting the Board's crucial finding that the strikers' jobs were not available to them between their refusals to work and their replacement.

(2) Whether the Board has any power to order reinstatement with back pay of striking employees who are told they are "discharged" or "fired" if their jobs are continuously open to them or if they have never unconditionally sought reinstatement.

(3) Whether the Board may order reinstatement with back pay of economic strikers where their strike has been neither caused nor prolonged by any unfair labor practice.

(4) Whether this Court should enforce an order of reinstatement and back pay for employees who, in going on strike at the time and place selected, violated obligations to work imposed by federal and state law and contract.

(5) Whether an affirmative order of the Board will be enforced which on its face admits the record does not show facts requiring reinstatement or back pay and they may never arise.

(6) Whether a respondent was lawfully and constitutionally denied use of discovery procedures to assist in preparation for a hearing in view of the broad discovery procedures open to the Board's general counsel and respondent's statutory right to subpoenas.

(7) Whether the Board gains authority to issue an order based on charges which in fact were filed by a labor organization that has not complied with Section 9(f), (g) and (h) of the Act by making an "administrative determination" that the charges were not so filed while refusing to hear contrary evidence.

(8) Whether the Board may consider an alleged unfair labor practice as to which no charge has been filed.

(9) Whether substantial evidence in the record as a whole sustains the Board's finding, contrary to that of the Trial Examiner, that certain statements of a minor supervisory employee are admissible evidence under Section 8(c) of the Act and show a violation of Section 8(a)(1) of the Act.

(10) Whether an omnibus cease and desist order of the Board will be enforced where there are no findings as to the respondent's opposition to the purposes and policies of the Act and the Board has refused to consider evidence showing its general acceptance of the Act.

(11) Whether an affirmative order of the Board will be enforced when the Board refuses to hear evidence as to why such an order will not effectuate the policies of the Act and fails to make findings or give reasons supporting such order.

SUMMARY OF THE ARGUMENT

1. The Board has no jurisdiction in this proceeding. The charges were filed by a labor organization that had failed to comply with Section 9(f), (g) and (h) of the Act. Respondent is entitled to prove this fact despite an "administrative determination" to the contrary. In addition, no charge was filed with respect to the alleged coercive statements.

2. Respondent was denied due process of law. The Board refused to permit it any discovery procedures. This was contrary to statute. It disregards the "cherished tradition of fair play" the Constitution guarantees in these proceedings.

3. The employees who struck in protest against Jones' discharge were economic strikers. The Trial Examiner's finding that their jobs were always open to them must be accepted; the Board's contrary finding is without support in the evidence. The Board's affirmative order depends on this finding. Even if the Board's conclusion of an unfair labor practice were correct, its order is punitive. It directs reinstatement with back pay although the strike was neither caused nor prolonged by an unfair labor practice. There is no "status quo ante" to restore; the "discharge" caused no effect. Furthermore the strikers violated their obligations to remain at work at the time and place they chose to strike. An order of reinstatement or back pay is contrary to law.

4. The Board's affirmative order was issued without the necessary procedure. The Board struck defenses, refused to accept evidence and failed to make the necessary findings on issues going to the propriety of an affirmative order.

5. The statements of Bash are, by virtue of 8(c), no evidence of an unfair labor practice. They contain no promise of benefit or threat of reprisal or force. In any event, the statements were not violative of 8(a)(1). They were not threatening or coercive. They are not chargeable to respondent.

6. The omnibus cease and desist order must be denied enforcement. There is no finding of a general attitude of opposition to the Act.

7. Were the Court to conclude that the present record indicates a basis for enforcement of the Board's order, it would then be called upon to grant respondent's motion for leave to adduce additional evidence. Respondent was

denied the opportunity to present evidence going to the availability to the strikers of their jobs while they were on strike, their strike demand that a union be recognized as exclusive bargaining representative while it was not the choice of a majority of the employees, the strikers' participation in activities in violation of the Act in carrying on their strike, and their abuse of their right to engage in concerted activity. It has asked leave to submit further proof that the strikers' jobs were open to them. This evidence all goes to the question of whether an affirmative order with back pay was justified. Respondent also was prevented from showing that the charges were filed by a union not in compliance. It is entitled to prove the error of the Board's "administrative determination" that it had jurisdiction to proceed on the charges.

ARGUMENT

I

The Order Is Not Within the Jurisdiction of the Board

A. THE CHARGES WERE MADE AND FILED BY A NON-COMPLYING UNION.

Section 9(f), (g) and (h) of the Act provides that no complaint shall be issued by the Board²¹ pursuant to a charge made by a labor organization unless that labor organization has (1) filed a statement containing certain detailed information concerning its officials, finances and internal organization; (2) brought such statement up-to-date annually; (3) filed affidavits that its officers are not Communists or fellow-travelers. We shall hereinafter refer to satisfaction of these requirements as "compliance."

Respondent alleged (R. 20) and sought to introduce evidence to prove (R. 123) that the charges herein had been made and filed by a labor organization that had not complied with Section 9.

Respondent asserted at the hearing, as it asserts here, that compliance was a question of fact which required inquiry and proof. The Trial Examiner ruled, "Well, if it is a matter of fact it is a matter of administrative fact

* * It is all an administrative matter. That has been consistently held by the Board ever since Taft-Hartley" (R. 23-24). The Board adopted the same position—that there could be no litigation of the matter of compliance (R. 80).

The Board's position in relation to these requirements has been overruled by the Supreme Court.

The Board advanced the same contention in *Labor Board v. Highland Park Mfg. Co.*, 341 U.S., 19 U.S.L. Week

²¹An order of the Board must be based on a complaint raising the issues on which the order is based. *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197 (1938).

4299 (U.S. Sup.Ct., May 14, 1951). It argued that an "administrative determination" regarding compliance was not reviewable at the instance of an employer in an unfair labor practice proceeding.

The Supreme Court held that the issue of compliance is a reviewable one. It stated:

"* * * the congressional purpose was to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government' * * *

"The further contention is advanced by the Board that the administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding. * * *

"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

In the present case there is a factual issue; clearly, if the facts are in dispute they must be litigated before the Board so that the legal questions may be here reviewed.

True, in the *Highland Park* case the facts were admitted and the only issue was one of law. The Court said,

"If there were dispute as to whether the C.I.O. had filed the required affidavits * * * and the Board had resolved that * * * a different question would be presented" (19 U.S.L. Week at 4299).

But that "different question" is not here presented. Here the Board has failed and refused to resolve the issue of fact as to compliance. Here, as in the *Highland Park* case, the issue "goes to the heart of the validity of the proceedings on which the order is based" and accordingly "it is open to the courts when they are asked to lend their enforcement powers to an administrative tribunal."

The Act denies jurisdiction to proceed on charges "made by a labor organization" not in compliance (Act, Sec. 9(f), (g) and (h)). Clearly the question as to who made the charge is a factual issue; the clear intent of Congress that Communistic unions not be permitted to use the Board's procedures is not to be subverted by an *ex parte* "administrative determination" that a charge was made by an individual if that conclusion is contrary to the fact. Respondent is entitled to its day before the Board to show that *in fact* a Communist-dominated union made the charges, and it is entitled, before this Court, to review of any questions of law involved.

The clear provision of the Act, as interpreted in the *Highland Park* case, requires denial of enforcement or, at the least, remand for determination of this basic, jurisdictional issue.

B. THE BOARD'S ORDER EXTENDS TO UNFAIR LABOR PRACTICES AS TO WHICH THERE IS NO CHARGE.

The Board's order concludes that respondent committed two distinct unfair labor practices: the first relates to cer-

tain alleged coercive statements made by a minor supervisory employee of respondent, the other relates to the strike action. In this section respondent attacks only the first portion of the order. It asserts that no charge has been filed with respect to this alleged unfair labor practice and that the Board was without power to issue the complaint or an order in the absence of a charge with respect to this unfair labor practice.

Section 10(b) of the Act provides:

“Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *.”

This language expressly fixes the limits of the Board's jurisdiction. It permits the Board to issue a complaint and an order with respect to an unfair labor practice when, but only when, a charge is filed stating the unfair labor practice, and such charge is filed and served within six months of the occurrence of that unfair labor practice.

It is clear that a discharge of a person for a specific act, not found to be activity on behalf of a named union, which occurs on a specific date, at a specific time, is a different unfair labor practice from one consisting of threats of dis-

charge or demotion as a penalty for other activity on behalf of a named union particularly where the threats occurred at different times and places from the discharge. The principle that different facts are different unfair labor practices and also the necessity that the complaint state the alleged unfair labor practice referred to in the order, were established by the Supreme Court in *Labor Board v. Sands Mfg. Co.*, 306 U.S. 332 (1939). The Court there stated, at pages 345-46:

"The Board found as a fact that in offering reemployment to two of its old men the respondent stipulated as a condition that they join the International Union. The finding is sharply challenged but, as there is evidence in support of it, we accept it. Based upon this finding the Board contends this stipulation in connection with the offer to hire the men was a violation of Section 8(3) of the Act independent of any of the violations flowing out of the discharge and refusal to reemploy the men as a body. The contention is irrelevant to any issue in the cause. The complaint alleged that the discharge of the men constituted an unfair labor practice in violation of Section 8(1) and (3) and that the execution of the agreement with the international association constituted an unfair labor practice under Section 8(5). It nowhere refers to any discrimination in hiring any man or charges any violation in connection therewith."

Applying this principle to the present situation it is clear that the order refers to two unfair labor practices and that only one of these is covered by the charge.

The cases cited by petitioner (O.B. 27-28) for the proposition that the complaint may "enlarge" upon the charge are quite beside the point. In the first place, this is not a case

of a complaint enlarging upon a charge—it is a case where the complaint alleges an unfair labor practice which was never made the subject of any charge. It was not referred to even indirectly in any charge, and it relates to matters entirely different from anything alleged in any charge.

The case cited by petitioner that is closest to the point is *Kansas Milling Co. v. Labor Board*, 185 F.2d 413 (10 Cir. 1950). In this case the Court of Appeals held that an *amended charge* may be filed later than the six months limitation period established by Section 10(b), if the amendments relate to the *same* unfair labor practices that were alleged in the original charge. Here in contrast, the Board has permitted litigation of an alleged unfair labor practice that is entirely different in every way from those alleged in the charge.

The *National Licorice* case, 309 U.S. 350 (1940) arose under the Act prior to the time the language we rely upon was added to the Act. Furthermore, the Supreme Court expressly refused to consider whether a new and different unfair practice could be alleged in the complaint under the old Act; it held only that where practices alleged in the charge were continued pending the hearing before the Board, the Board could consider them, even though, of course, it would be impossible for any charge to be filed in that proceeding concerning them. The *Consumers Power*,²² *American Creosoting*²³ and *Fort Wayne Corrugated Paper*²⁴

²²*Consumers Power Co. v. Labor Board*, 113 F.2d 38 (6th Cir. 1940).

²³*Labor Board v. American Creosoting Co.*, 139 F.2d 193 (6th Cir. 1943).

²⁴*Fort Wayne Corrugated Paper Co. v. Labor Board*, 111 F.2d 869 (7th Cir. 1940).

cases likewise all arose under the law prior to the amendment to Section 10(b). Furthermore, they involve only the constitutional sufficiency of the complaint to give notice to the employer where the charge supports the complaint. They do not involve the requirement in Sec. 10(b) that a charge be filed stating the unfair labor practice involved. The *Fulton Bag*²⁵ and *Indiana & Michigan*²⁶ cases are absolutely beside the point, except that the *Indiana & Michigan* case emphasizes that the charge is jurisdictional. In the *Cathey Lumber* case,²⁷ which was enforced without opinion,²⁸ the Board held (1) the additional unfair labor practices alleged in the complaint were of the same nature as those alleged in the charge; (2) the employer had waived the six months requirement when it failed to raise this point in its answer. That case merely sustained the Board's conclusion that the issue was waived.

In the instant case, the charges referred only to specific discharges on or about January 22, 1949. We make no point of the language used or the artistic or inartistic way in which the charges were drawn; we are concerned with their substance. They stated that on such a day respondent discharged the charging employee for concerted activity in protesting the discharge of Jones (R. 6, 7-8). Nowhere is there mention of threats of discharge or demotion as a penalty for activity on behalf of the ACA. In fact, the ACA is not mentioned. Yet the complaint alleges (R. 10-12) and the Board's order finds (R. 81, 83, 88-89) other un-

²⁵*Labor Board v. Fulton Bag & Cotton Mills*, 180 F.2d 68 (10th Cir. 1950).

²⁶*Labor Board v. I. & M. Electric Co.*, 318 U.S. 9 (1943).

²⁷*Cathey Lumber Co.*, 86 N.L.R.B. 157 (1949).

²⁸*Cathey v. Labor Board*, 185 F.2d 1021 (5th Cir. 1951) (Mem.).

related violations; and the Board grants relief based upon such unrelated allegations (R. 91-94). This the Board is without power to do.

Closely in point is *Joanna Cotton Mills Co. v. Labor Board*, 176 F.2d 749 (4 Cir. 1949). There a charge alleged the discharge of a man on account of union activities and membership. More than six months after the effective date of the 1947 amendments (which inserted the provisions of Sec. 10(b) quoted above) an amended charge was filed which referred to the same discharge but alleged it was for engaging in concerted activities having no relation to union activities. The Court set aside the order of the Board relating to the unfair labor practice stated in the amended charge:

“Section 10(b) of the Labor Management Relations Act, 29 U.S.C.A. § 160(b), specifically provides that ‘no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.’ * * * No charge relating to discharge for engaging in concerted activities, as distinguished from union activities, was served upon the company until more than six months had elapsed after the act had become effective.

* * * * *

“The case seems clearly one for the application of the rule recently announced by the Supreme Court that ‘a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to

the first claim.' *United States v. Andrews*, 302 U.S. 517, 524; *United States v. Garbutt Oil Co.*, 302 U.S. 528. * * *

"For the reasons stated, the order of the Board will be set aside."

The Court of Appeals for the 7th Circuit has recently denied the position here taken by the Board that the filing of a charge permits it to go into any unfair labor practice that occurred within six months of filing.²⁹ In *Superior Engraving Company v. Labor Board*, 183 F.2d 783 (7th Cir. 1950), cert. denied 340 U.S. 930 (1951), the Court refused to give consideration to unfair labor practices that were not alleged in a charge, even though referred to in the complaint, on the ground that Section 10(b) requires filing and service of a charge with respect to a specific unfair labor practice before the Board has jurisdiction to proceed with respect to it.

Accordingly, the provisions of the Board's decision and order relating to alleged threats and coercive statements concerning the ACA are void for the reason that no charge was filed and the Board was without jurisdiction to consider them.

²⁹The Board goes so far as to argue (O.B. 28) that service of the complaint was a sufficient compliance with the Act, although the Act explicitly requires service of the *charge*, Sec. 10(b), in such manner as to make the requirement jurisdictional.

II.

The Board's Procedure Denied Due Process of Law**A. THE BOARD'S PROCEDURE DENIED RESPONDENT THE FAIR HEARING REQUIRED BY STATUTE AND THE CONSTITUTION.**

Respondent sought to utilize discovery procedures so as to place it in a comparable position to that of the general counsel of the Labor Board in presenting the evidence at the hearing and building the record considered by the Trial Examiner, the Board and this Court.

The general counsel of the Board has a right by statute to carry on an intensive pretrial investigation of the issues. This includes the investigatory powers of access to the premises of respondent with the right to copy any evidence there found (Act, Sec. 11(1)); in addition, the Board's investigators take statements from all parties and those having knowledge as to the charges, including respondent's supervisory staff.³⁰

Respondent, however, cannot unilaterally take statements from any of the persons on strike, for such action would in itself be an unfair labor practice under Section 8(a)(1). *Labor Board v. Botany Worsted Mills*, 106 F.2d 263 (3 Cir.

³⁰Sec. 101.4 of the Board's Statements of Procedure provides:

"Investigation of charges.—When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed, hereinafter called the respondent, is asked to submit a written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges."

1939); *Labor Board v. Stone*, 125 F.2d 752 (7 Cir. 1942); *Interstate Folding Box Co.*, 47 NLRB 1192 (1943). The rules of the Board, however, make provision for the taking of depositions (NLRB Rules and Regulations, Sec. 102.30) and the Act places a mandatory duty upon the Board to issue subpoenas requiring the attendance and testimony of witnesses and production of any evidence upon application of any party to a proceeding before the Board (Sec. 11(1)). Accordingly respondent prepared applications for subpoenas for the taking of depositions before trial, in accordance with the usual and standard procedure under the Federal Rules of Civil Procedure for the United States District Courts (R. 103-119).

The Board denied respondent any opportunity to use the discovery process, by order prior to hearing (R. 120-23) by order of the Trial Examiner (R. 99-102) and by final order of the Board (R. 80).

The denial of the subpoenas was a violation of both the Act and Section 6(c) of the Administrative Procedure Act. It furthermore was a denial of due process of law in violation of the Fifth Amendment. It is well established that this amendment guarantees a fair and equitable procedure in the course of administrative adjudication. While the requirements of due process of law are neither rigid nor technical, there is a positive obligation upon the administrative tribunal to act "in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Morgan v. United States*, 304 U.S. 1, 22. The courts have recognized that adjudication should not be a contest of wits between attorneys in which both sides are free to conceal and withhold the evidence they have so as to take full ad-

vantage of any opportunity to surprise and disconcert opposing counsel. Accordingly, the Federal Rules of Civil Procedure provide a full and exhaustive discovery method so that all parties are fully acquainted with all of the evidence before the case comes to trial. Fed. R. Civ. Proc., 26-37. On the basis of a realization that there can be fair and sound adjudication only if every one is aware of the evidence so that the actual facts will determine a decision, the discovery procedure has been generally adopted in the state, as well as in the federal, courts.

The broad scope of the discovery procedures given general counsel for the Board is in sharp contrast with the limited rights of the respondent and an employer's obligation under the Act to refrain from any inquiry of employees, strikers or former employees with respect to a matter that may be in litigation. Here respondent carefully sought to obtain a fair and equal position to that of the general counsel and utilized the provisions of the regulations and law that would assist such action. It was denied equivalent treatment, even such as was required by statute. As a result, respondent's counsel came into the trial with no knowledge as to what evidence was available to the general counsel for the Board, but the Board's general counsel had complete information as to every item of evidence available to respondent's counsel. We respectfully submit that such inequitable treatment does not accord "with the cherished judicial traditions embodying the basic concept of fair play" and the order must, therefore, be denied enforcement.

III

**The Board's Affirmative Order of Reinstatement
with Back Pay Is Contrary to Law****A. THE ORDER DEPENDS ON A FINDING THAT IS WITHOUT SUPPORT IN
THE EVIDENCE.**

The crucial finding of fact, on which the Board's conclusion that reinstatement with back pay was required because of a violation of 8(a)(1) and 8(a)(3) by "discharge" of the strikers, is contrary to the fact and is without substantial evidence to support it on the record considered as a whole.

The Board and the Trial Examiner reached directly contradictory conclusions as to reinstatement and back pay for the strikers. The difference in these conclusions turns on the finding of the Trial Examiner that any or all of the strikers could have had their jobs back at any time before they were filled by new employees (R. 39). The Board stated a contrary finding. It "found" that the strikers could *not* have had their jobs back between the time they went on strike and the time their jobs were filled by new employees (R. 85n) and therefore that their subsequent replacement while on strike would not have the usual consequences of replacement of economic strikers.³¹

The Board concluded that respondent had taken the position that it would not return the strikers to work even if the strikers gave up their demand for the reemployment of Jones. There is no quarrel in the Board's decision, or in the brief supporting it, with the proposition of the Trial Examiner that reinstatement or back pay could not be ordered

³¹The Board and the Examiner agreed that the strike was an economic one and that respondent would normally be free to replace the strikers while they continued on strike (R. 84).

if the jobs of the strikers were available to them during the period of their strike, up to the time they were replaced by new permanent employees.

The Board's finding that the jobs were not open to the strikers must be rejected by this Court.

From the record as a whole it appears that there was no real dispute during the course of the hearing with respect to the availability of the strikers' jobs if they would give up their demands for the reemployment of Jones. The record shows that it was the position of the General Counsel that the discharge of Jones was an unfair labor practice and that the strikers were secure in their refusal to return to work until Jones was reemployed, because the strike was an unfair labor practice strike rather than an economic one. *At no time was there any suggestion that respondent was denying reemployment to the strikers if they would give up their demand for the reemployment of Jones.*

Nevertheless, there is clear evidence in the record that respondent was ready, during the strike, to return the strikers to work if they would give up their demand for the reemployment of Jones. This was the reason why the Trial Examiner found, with respect to all of the strikers, "It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers' jobs with other and permanent employees" (R. 39). This finding by the Trial Examiner, who conducted the hearing, heard the testimony and observed the witnesses, is a persuasive fact to be considered by this Court in judging whether there is

substantial evidence in the record considered as a whole to support the contrary finding of the Board. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951).³²

There is convincing evidence in the record to support the Examiner's finding. Thus the record shows that there were repeated attempts by supervisory employees of respondent to get the strikers as a group to give up their demand for the reinstatement of Jones and return to their jobs. Bash and McPherson both made it clear to the employees that their jobs were available to them and the afternoon meeting at which this was discussed was terminated only when the strikers asked for their paychecks (R. 210). Two of the strikers received individual telegrams, because of the uniqueness of their situations, asking them to meet with the District Manager of respondent with the indication that they could be returned to work (R. 320-22; 349-50). The record further shows that respondent met with collective bargaining representatives of the strikers a few days after the strike began, at which time their discussion went so far as to go into the possibility of recognizing the ACA as representative of all of the employees including the strikers (R. 464). Respondent has further asked leave to adduce evidence on this point and has offered to prove that at this time it and the ACA-C.I.O. Committee explored in detail the matter of return to work of the strikers and that the demands of the strikers on their return to work were considered (R. 461-465; 481-483). In short, this indicates

³²Wherein the Supreme Court said, " * * * evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." 340 U.S. at 496.

that respondent was treating the strikers as strikers and was negotiating with their representatives regarding the terms and conditions under which they would return to work.

What, if any, evidence is relied upon by the Board in support of its contrary finding is not clear. None is referred to by it (R. 85). However, it appears from the Board's brief (O. B. 7-8; 19) that it goes so far as to argue that Lillie Friend was discharged and was denied any chance to return to work if she would give up her demand for the reemployment of Jones, when she was told that her job was waiting for her, that she should go to work, and, when she failed to do so, "Well, trot along then."³³

The Board argues that the mere statement to employees that they were "discharged" or "fired" or even "well, trot along then" constitutes heresy and unfair labor practice justifying an order of reinstatement with back pay.

On this point the Board places heavy reliance upon *Labor Board v. Remington Rand, Inc.*, 130 F.2d 919 (2 Cir.). That case, however, is without significance unless the Board's finding overruling the Trial Examiner's finding that the strikers' jobs were at all times open to them is not accepted by the Court. In the case relied upon by the Board, the employer sought to deny any right of reinstatement to strikers on the ground that they had been discharged prior to the time that they had been replaced by others. It sought to justify "its immediate discharge of the strikers and attempted abnegation of the employment rela-

³³It is significant that respondent's offer of proof in connection with its motion for leave to adduce additional evidence states that Lillie Friend has been reemployed and presently is an employee of respondent (R. 463).

relationship" on the ground of non-discrimination. The Court concluded, however, that the employer's action was discriminatory because it was contrary to the employer's practice with respect to non-union employees engaging in similar work stoppages and was accomplished by an attempt to "sever the employment relationship" by immediate action giving no "locus penitentiae." Relying on these facts, the court concluded that a discriminatory refusal to permit strikers to return to work before their jobs were filled and after they had sought reinstatement was an unfair labor practice. These facts are a far cry, it is patent, from those found by the Trial Examiner, for here the strikers' jobs were open to them and respondent gave the strikers repeated opportunities and invitations to return to work.

On consideration of the record as a whole, there is not substantial evidence to support the Board's "finding" that is the keystone to its order of reinforcement and back pay. Enforcement should therefore be denied.

B. THE ORDER OF REINSTATEMENT WITH BACK PAY IS PUNITIVE, NOT REMEDIAL.

Even were we to accept the Board's findings and conclusion that the strikers were told they were "discharged" or "fired" in violation of the Act, reinstatement with back pay would be contrary to law. It is admitted in the Board's decision and order that these alleged unfair labor practices did not cause a strike and did not prolong a strike. No one of the strikers was in any way hurt or injured by such alleged unfair labor practices. They went on strike independent of these, they stayed on strike independent of these, and they remained on strike, independent of these. They

continued their refusal to return to work unless respondent acquiesced in their demands, insofar as the record shows, right up to this moment. The only exceptions relate to those strikers who have returned to work.

It was clearly established in one of the earliest cases involving the Act that the Board's power to order reinstatement with or without back pay is a purely remedial power. *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 235-36 (1938):

"This authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purpose of the Act."

Where the employer's unfair labor practice has not deprived any employee of work and there are no facts showing that he has suffered any loss of pay, an order of reinstatement with or without back pay is punitive, not remedial. The use of the word "discharged" or "fired" deprived no one of work or of pay.

The Board has previously concurred in this position and has agreed that reinstatement with back pay is not required with respect to economic strikes except only where the economic strike has been turned into an unfair labor

practice strike and it has been prolonged because of the unfair labor practice. *Wilson & Co. v. Labor Board*, 120 F.2d 913 (7th Cir. 1941). Its deviation from its usual rule is contrary to law and enforcement of the resulting order should be denied.

C. THE ORDER OF REINSTATEMENT AND BACK PAY IS IN VIOLATION OF LAW.

The power to order reinstatement with back pay, *even of unfair labor practice strikers*, "is not unlimited." *Labor Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). Such an order is unlawful where it disregards the entire structure of law. As the Supreme Court stated in *Southern S.S. Co. v. Labor Board*, 316 U.S. 31, 47 (1942):

"* * * the board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

"This was the kind of consideration for which the present case called."

In that case the Court concluded that the reinstatement ordered by the Board "exceed[ed] the Board's authority to make such requirements 'as will effectuate the policies of the Act' ". The Court continued by stating:

"Nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self help, so long as the time and place it

chooses does not come within the express prohibition of Congress." 316 U.S. at 49.

Initially, we wish to point out that respondent does not suggest that its employees do not have the right to strike. To the contrary, it concedes this right. It recognizes its employees may strike or take other concerted action as they choose so long as their choice of time, place, technique and goals does not result in violation of other provisions of law. Respondent urges, in this section, that the law imposes certain obligations upon its employees upon their voluntary taking over a watch. The public interest requires that these employees stand the watch and transmit messages so that, absent notice to the contrary, the public will get the service upon which it relies.

The facts show that the strikers violated their obligations under the law when they went on strike. Thus the workers who were due to man the afternoon and midnight watches on January 21 reported to work as usual at the regular time. Then they relieved the workers who had been manning the previous watch. They assumed their duties and started to perform them for some time. Subsequently and according to prearranged plan and with the intention of preventing the continuance of operations, they deserted their watch and refused to provide the public utility service that the public was entitled to have. In fact several of the strikers on the midnight watch took such action after specifically advising respondent that they would come to work as usual.

The Federal Communications Act imposes an obligation upon respondent's employees to accept and send messages during a watch that they assume. When such an employee

comes on the job and takes over a watch and relieves another worker, the statute places him under a duty to serve the public.

The Board admits that Section 201 imposes a duty on respondent to furnish service to the public upon reasonable request. (R. 86) Failure to provide such service is a violation of its basic duty as a common carrier of interstate and foreign communications by radio. This statute further provides, in Section 217 (quoted at p. 16 above), that any act, omission or failure of an employee of respondent is deemed to be the act, omission or failure of respondent. Here the workers took over their circuits and entered into the scope of their employment; thereafter they failed and omitted to handle messages. Respondent thereby failed and omitted to furnish service as required. Respondent thereby unlawfully breached its duty as a public utility.

Section 501 of this statute (quoted at p. 16 above) further provides that respondent's employees, including the strikers, are guilty of a felony if they willfully and knowingly cause or suffer something to be done that is prohibited or declared to be unlawful by the statute. The acts of the strikers caused an unlawful failure to provide service for which respondent was liable. The acts were willful. Hence, their desertion of their circuits while on watch and their refusal to man the circuits during the period of their watch constituted a violation of the Federal Communications Act.

True, respondent need provide service only on "reasonable request." However, if there is no notice of a strike, a request in the usual manner is "reasonable" and it is to be satisfied. If the strikers had given reasonable notice to the public or had failed to assume their duties as employees at

the begining of a watch, there may well have been no violation of law by them. But to have refused to work without notice, at the time and place selected, renders their acts unlawful.

Section 638, California Penal Code (quoted at p. 16 above), likewise imposed an obligation. This section makes employees of respondent guilty of a misdemeanor if they refuse to send messages received at the office for transmission. It required each striker to have performed his work during the watch he assumed. He was under a duty to send any message received. The New York Court of Appeals has recently dealt with a similar situation under a provision of the New York Statutes in language identical to Sec. 638. Employees of Western Union were discharged for refusing to handle certain messages while they were on duty on the ground that the messages were strike-bound. The court held that the New York statute and also the Federal Communications Act required the company and the employees to send these messages so long as they chose to occupy positions in the company's office rather than leaving their positions and going on strike. This case enforces the obligation upon those who are at work to send messages while they are on watch. It upholds the right of an employer to discharge those who refuse to send messages during the course of a watch they have assumed. *Western Union Tel. Co. v. American Communications Association*, 299 N.Y. 177, 86 N.E.2d 162 (1949).

There is a further obligation to keep the circuits operating throughout the watch by virtue of contract. The old agreement had a specific no-strike clause incorporated in it. Respondent had offered work to the employees in ac-

cordance with the terms of that agreement and the employees had accepted this offer when they continued to work in response to this offer. Furthermore, there had been a similar precipitous work stoppage by these workers some months before. When this was discussed between the ACA representatives and the company, while the status of the ACA was in doubt, it was agreed that the workers were obliged to keep the circuits operating while they were on watch. This obligation was further clarified by a posted company rule indicating that a refusal to perform work was a ground for discharge. These provisions of the employees' old written contract, their oral contract of employment, and the rules of the employer serve to buttress and clarify the clear obligation imposed by law: telegraph employees while on duty are required to continue work during their watch and furnish service as called upon by the public.

This duty was breached when the strikers engaged in their unannounced wildcat "strike."

An order of reinstatement with back pay under such circumstances, we submit, is a single-minded consideration of the Act that wholly ignores other and equally important provisions of law. It disclaims "careful accommodation of one statutory scheme to another." In a wide variety of instances, similar to the situation here presented, the courts have held reinstatement with back pay to be contrary to law.

An order of reinstatement with back pay was denied enforcement in *Labor Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240. There strikers had engaged in a sit-down strike and others had aided or abetted those engaged in

the sit-down. The Court refused to enforce an order of reinstatement, stating the Act "did not automatically provide reinstatement" and continuing, "The affirmative action that is authorized is * * * not to license [strikers] to commit tortious acts or to protect them from appropriate consequences of unlawful conduct." To a similar effect is *Labor Board v. Sands Mfg. Co.*, 306 U.S. 332. There, an employer rightfully understood his employees were "irrevocably committed not to work in accordance with their contract" and replaced them. The Court stated that the Act permits "an effective discharge for repudiation by the employee of his agreement." See also *Labor Board v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944). Where an employee goes on strike in violation of an obligation to work arising out of custom and practice, an order of his reinstatement is contrary to law. *Albrecht v. Labor Board*, 181 F.2d 652 (7th Cir. 1950). Where a seaman goes on strike at a time and place the law requires him to continue work, an order of reinstatement is in excess of the Board's authority. *Southern S.S. Co. v. Labor Board*, 316 U.S. 31.

The Courts have found that there are even more stringent limitations upon the Board's authority to order reinstatement with or without back pay. *Labor Board v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946), involved a group of employees who remained on their employer's premises without quitting their employment, but who refused to perform certain of their duties in accordance with reasonable orders of their employer. Their concerted refusal was on the ground that the work involved was strike-bound. They were discharged, and the Board ordered their

reinstatement. The Court of Appeals denied enforcement, stating:

“There being an implied obligation on the part of the employees to obey the reasonable instructions of the employer while the employment continued, their refusal to do so was proper ground for their discharge, and having been properly discharged there was no duty on the part of respondent to reinstate them.”
157 F.2d at 497.

Similarly, where employees are offered a day's work, including straight time and overtime, and they go to work but leave without completing the shift offered, there is no right in the Board to order reinstatement to employees whom the employer refuses to permit to come to work until they were ready to accept the employers' requirement that they work the full shift. *Labor Board v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 267 (6th Cir. 1945).

While the Board may not have acquiesced in the courts' decisions in the two cases last referred to, the other cases preclude enforcement of the Board's affirmative order of reinstatement with back pay, for these strikers' refusal to work was in violation of law and the Board's order of reinstatement may not be used to protect strikers from appropriate consequences of their unlawful conduct.

D. THE ORDER OF REINSTATEMENT AND BACK PAY SHOULD NOT BE ENFORCED, FOR IT IS INTERLOCUTORY AND HYPOTHETICAL.

The Board's order provides that, *if* facts develop in *one* of the possible ways they might, respondent should reinstate strikers with back pay. The Board concluded that reinstatement with back pay was appropriate only if the strikers should abandon their strike and then only if such

abandonment should occur prior to offers of reinstatement. The Board admits in its brief (O.B. 37) "If the strike has not yet been abandoned, then respondent's liability for back pay has not yet accrued." The order itself makes it clear that if the strike has not yet been abandoned, the obligation to reinstate has not yet arisen.

In short, the Board admits that the record it has filed with this Court does not provide the basis for an unconditional order of reinstatement or back pay and that there may never be a basis for one.

The courts have repeatedly denied enforcement of such orders. We submit it is hornbook law that the record filed in the Court of Appeals must include findings, with the necessary support in the evidence, to justify reinstatement with back pay before any such order may be enforced. The Board has no power to issue hypothetical orders that have meaning only IF certain facts should arise. The Board's orders must be clear and specific, final and definite. Since "violation of the order brings the swift retribution of contempt, without the normal safeguards of a full dress proceeding . . . we must require explicit language." *Labor Board v. Stowe Spinning Co.*, 336 U.S. 226, 233 (1949). As has recently been said with respect to the Railway Labor Act, a provision for orders of the type here involved "contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts." *Railroad Yardmasters v. Indiana Harbor Belt R. Co.*, 166 F.2d 326, 330 (7th Cir. 1948). This principle is repeatedly applied with respect to the Labor Board's orders, requiring that they be final and

definite, not interlocutory and at large. *May Department Stores v. Labor Board*, 326 U.S. 376, 392 (1945); *Labor Board v. Reynolds Corp.*, 168 F.2d 877 (5th Cir. 1948); *Labor Board v. National Biscuit Co.*, 185 F.2d 123 (3rd Cir. 1950). Thus: "The court will be acting well within the limits of its judicial discretion in withholding the use of its injunctive powers until the Board's order has been put in final form." *Labor Board v. Kelco Corp.* 178 F.2d 578 (4th Cir. 1949); see also *Labor Board v. Express Publishing Co.*, 312 U.S. 426, 435 (1941).

The application of these principles to situations like that here presented is clear. The record must include affirmative findings that strikers, even unfair labor practice strikers, have made an unconditional offer to return to work before a court will enforce an order of reinstatement with back pay. Thus, a conditional offer to return to work, even where an economic strike had been converted into an unfair labor practice strike, is an insufficient basis for such an order. *Labor Board v. Crosby Chemical Co.*, 188 F.2d 91 (5th Cir. 1951); cf. *Pacific Gamble Robinson Co. v. Labor Board*, 186 F.2d 106, 110-111 (6th Cir. 1950). Furthermore, reinstatement will not be enforced, even where economic strikers have unconditionally offered to return to work, unless there be findings as to the number of positions open. *Labor Board v. Shenandoah-Dives Mining Co.*, 145 F.2d 542 (10th Cir. 1944); *Kansas Milling Co. v. Labor Board* 185 F.2d 413 (10th Cir. 1950). In fact, orders have been remanded to the Board where its only error was in using the wrong date in figuring back pay. *Home Beneficial Insurance Co. v. Labor Board*, 159 F.2d 280 (4th Cir. 1947).

The Board nevertheless asks for enforcement of its present order, contending that respondent raises questions only

as to compliance with it (O.B. 37-38). In each of the cases relied upon by the Board, the respondent there admitted that the Board had established the necessary basis for an order, but contended that it had satisfied the order. None of these cases presented a situation, like that in this case, where the necessary findings for an order of reinstatement with back pay had not been made. Here the Board's order, itself, states there can be no obligation to reinstate with back pay until these strikers abandon their strike. And it states that no finding of abandonment can be made on the record. Hence, the Board has not only failed to make the finding necessary to support an order of reinstatement with back pay, but it has made contrary findings demonstrating that such an order is without support. The Board admits its order would be lawful only IF something happens in the future. We therefore respectfully submit that the Court should deny enforcement of the affirmative order.

E. THE BOARD'S AFFIRMATIVE ORDER WAS ISSUED WITHOUT THE REQUIRED TAKING OF EVIDENCE, FINDING OF FACTS AND STATING OF REASONS.

In A through D above we have shown that the affirmative order should be denied enforcement and set aside because contrary to law. As an alternative and further defense to the order, we urge that even if these errors did not exist the affirmative order should not be enforced because of procedural errors. Respondent's pleading raised defenses that an affirmative order would not effectuate the policies of the Act (R. 23). These defenses were stricken (R. 126-127). The Board refused to admit evidence relating to these defenses as well as establishing a general proposition that evidence going to them would not be admitted

(R. 184-186, 200, 204, 240-241, 277-278, 341, 400, 402, 425-427).

The Board issued an affirmative order of reinstatement with back pay (R. 94), as if such an order were automatically justified wherever the Board concludes that a "discharge" constitutes an unfair labor practice. There are no supporting findings showing a situation requiring an affirmative order to restore a status quo (R. 91-92). In short, the Board's order assumes that it has power to order this affirmative action, *and that it will do so as a matter of course.*

While it is established as a "dry legal question" that the Board has power to order affirmative relief in many situations, the Board must exercise its discretion, even where the law does not preclude such affirmative relief. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 196-197 (1941). The purpose of an order of reinstatement and back pay, where discrimination is found, is (*ibid.*): "A restoration of the situation as nearly as possible to that which would have obtained but for the illegal discrimination." Such an order is not to be issued by the Board merely as a matter of administrative rote. Consideration of the background and the individual situation is required; and a bare conclusion that reinstatement with back pay will effectuate the policies of the Act may not be enforced. There must be findings of fact and appropriate reasons. *Labor Board v. Don Juan, Inc.*, 178 F.2d 625 (2d Cir. 1949). The Board is not at liberty to draw upon its presumed *expertise* and make conclusions therefrom, cf. *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793 (1944), but it must hear evidence offered by a party before it with respect to appropri-

ateness of the proposed relief. An order issued without consideration of such evidence will not be enforced. *Labor Board v. I. & M. Electric Co.*, 318 U.S. 9 (1943); *Labor Board v. Kelco Corp.*, 178 F.2d 578 (4th Cir. 1949).

In the present case reinstatement was ordered merely because the employees were told they had been fired (R. 91), although there is no evidence that any unfair labor practice caused or prolonged the strike, that any of the strikers sought reinstatement (except on condition that respondent reemploy Jones, recognize the ACA and agree to other economic demands), or that the economic strike has ended (R. 92-93). In such circumstances, the Board has repeatedly held that reinstatement or back pay is not called for, and has so admitted in the courts. See *Wilson & Co. v. Labor Board*, 120 F.2d 913 (7th Cir. 1941). In that case, strikers were denied reinstatement by the petitioner therein on the ground that while on strike they had been replaced by new employees. The Board conceded in its brief: "This petitioner had, of course, the right to do until July 3, since theretofore the strike had neither been caused nor prolonged by its unfair labor practices." (Quoted at 120 F.2d 922).

Yet in the present order, as in the *Phelps Dodge* and *Don Juan* cases, *supra*, the Board gives neither findings nor reasons for its order, even though the strike here was neither caused nor prolonged by an unfair labor practice. Nevertheless, the Board's order includes merely a stereotyped statement, a bare legal conclusion without any facts or any consideration thereof to support it.

The Board's procedure was unlawful in other respects: an affirmative order was issued after refusing to consider

issues which must be weighed in exercising its discretion to order affirmative relief.³⁴

The Board must consider the purposes of the strike. Affirmative relief is to be denied where the strikers seek to compel an employer to grant a wage increase without authorization by the War Labor Board. *Labor Board v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945). The Board itself has refused reinstatement where the purpose of the strikers was to force an employer to violate the War Labor Disputes Act, *American News Company*, 55 NLRB 1302, or to recognize one union while the employer was under a legal duty to bargain with another. *Thompson Products, Inc.*, 72 NLRB 886. Here, the strikers sought to compel respondent to recognize the ACA although the strikers admitted it was not the choice of the majority of the employees in the bargaining unit.

The Board is required to consider the strike technique used and to deny reinstatement where strikers have used unduly unfair strike tactics. *Labor Board v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); cf. *Auto Workers v. Wisconsin Board*, 336 U.S. 245 (1949). The Board must

³⁴Respondent offered to prove, if the taking of additional evidence is necessary: "(1) The strikers demanded, as a condition to their returning to work, that Respondent recognize the ACA as exclusive representative for bargaining purposes of all of its employees in an appropriate unit although they then admitted that the ACA was not the choice of the majority of the employees in such unit; (2) The strikers engaged in unlawful activities during the strike by participating in, and making their own, acts in violation of Section 8(b) of the National Labor Relations Act and by violating other statutory law. (3) The activity of the strikers was not protected concerted activity because they had entered into an agreement with Respondent not to engage in such action and they did thereafter plan and carry out a quickie strike in violation of this commitment" (R. 482-483).

also weigh the individual actions of the strikers whose reinstatement it considers. Those who have engaged in a sit-down strike or assisted in it cannot be reinstated. *Labor Board v. Fansteel Corp.*, 306 U.S. 240 (1939). It must deny reinstatement to those who engaged in terrorism, *Labor Board v. Standard Lime & Stone Co.*, 97 F.2d 531 (4th Cir. 1938); violence and unlawful conduct, *Wilson & Co. v. Labor Board*, 120 F.2d 913 (7th Cir. 1941); dynamiting, *Labor Board v. I. & M. Electric Co.*, 318 U.S. 9 (1943); shooting, *Labor Board v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943); and distribution of defamatory literature. *Labor Board v. Maryland Drydock Co.*, 183 F.2d 538 (4th Cir. 1950). The Board refused to consider evidence of the strike tactics and unlawful activities of the strikers and to weigh these facts in considering whether affirmative relief should be ordered.

Even if the Board's order were not clearly contrary to law for the reasons stated in other sections, the defects in the Board's procedure would require this Court to refuse to enforce the Board's order on the record here presented.

IV

The Alleged Threatening and Coercive Statements

A. THE CIRCUMSTANCES SURROUNDING THE STATEMENTS.

The Trial Examiner found that certain statements had been made by Bash (R. 40-42) and that his statements involved no threat of reprisal or force or promise of benefit (R. 42). The Board reversed these findings and found the statements to have such effect (R. 83). It thereupon gave consideration to these statements, in disregard of § 8(c) as evidence of an unfair labor practice. On this "evidence" it found that respondent had violated § 8(a)(1).

We submit that the findings of the Trial Examiner accord with the fact and that the Board's contrary findings are without substantial evidence to support them on the record considered as a whole. In fact, the Board's decision and order shows upon its face that the Board did not even purport to issue findings in this in this respect, but instead stated conclusions with respect to the statements, as if the words were unfair labor practices *per se*. Thus the Board based its conclusions with respect to these statements upon references to other cases involving different situations and not upon the facts and background present in this case (R. 82-83).

Undoubtedly the Trial Examiner gave great weight to the general background of Bash's statements and the consideration to these statements received in the hands of the ACA contingent among respondent's employees. There is a great body of evidence supporting the Examiner's conclusion that there was no promise of benefit, or threat of force or reprisal. Thus, members of the ACA contingent threatened to hit Bash if he made any further comments regarding their communist or fellow traveler status.³⁵ Thus it is clear that little, if any, respect was given to Bash's opinions or comments and that there was no fear of discipline in connection with his comments. They told him he did not think before he talked (R. 213); they accused him of being a raving maniac (R. 209) who was always hollering (R. 195, 175). Niemi demanded his discharge before his face (R. 147). Other of the strikers demanded his discharge

³⁵Thus Jones testified to having stated to Bash, " 'You have been referring to me as a Communist and if you call me that I will attempt to answer that with violence.' " (R. 141).

in a meeting with McPherson (R. 198). His temper led the Trial Examiner to find that Bash was "of an excitable and undiplomatic temperament (R. 41).

B. THE STATEMENTS DID NOT VIOLATE THE ACT IN ANY EVENT.

In addition to this background, it is clear with respect to individual statements that they are protected under 8(c); thus great stress is placed upon statements during a telephone conversation between Bash and Pottle as to which the Board found there was an assurance of job security (R. 82) although Pottle had already gone on strike and testified that there was no suggestion that she come back to work (R. 220). Another statement was found to have a threat of force or reprisal (R. 82) although it was made in the course of a conversation with Pottle that Pottle described as being an apology for what had occurred (R. 214-15).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights" to self-organization, to form, join or assist labor organizations, etc. Employers have often been held to violate Sec. 8(a)(1) by threats based on anti-union animus. However, the test of threats and coercions is not objective, but subjective. The inquiry is a factual one, which must be based on the evidence. *Labor Board v. Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945). If in fact the statements were not threatening or coercive in their impact on the employee to whom they were addressed, then there is no violation of Sec. 8(a)(1). Ibid.

Section 8(c) provides that an expression of views, argument or opinion "shall not constitute or be evidence of an

unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." The Trial Examiner found that statements relied upon by the Board did not contain any threat of reprisal or force or promise of benefit (R. 42). The foregoing discussion clearly shows that this finding was correct and the Board's contrary finding is without support in substantial evidence on the record considered as a whole. Thus the Board's conclusion of a violation of 8(a)(1) by statements of Bash is based on evidence that cannot be considered and upon findings that are without support in the record.³⁶

C. RESPONDENT DID NOT VIOLATE 8(a)(1) BY BASH'S STATEMENTS.

The Board has concluded solely from the statements of Bash that *respondent* interfered with and coerced its employees and that they establish a policy that respondent "would resort to any measure necessary to rid itself" of the ACA, that it "intended to discriminate against ACA members" and that it "intended to oust the ACA and discharge its adherents" (R. 82-83)

It is clear that all the statements relied upon by the Board, if they were made, were made by a minor supervisory employee while under great emotional stress and while his opinions and statements were being generally disregarded by all persons who the Board concludes were threatened or coerced by his statements. There is no basis in the evidence for suggesting that respondent thereby in-

³⁶The absence of evidence to support the Board's findings as to the nature of these statements is further demonstrated by its failure to consider the facts and the background and its substitution of references to other decisions involving other situations has its support for its purported findings (R. 82-3).

terfered with, restrained or coerced any person,—employee or not.

It is well settled that the Board is not at liberty to give to isolated statements of a supervisory employee the effect of establishing a policy of a corporate employer. *Maryland Drydock Co. v. Labor Board*, 183 F.2d 538 (4th Cir. 1950). "Isolated or casual expressions of individual views made by supervisory employees, not authorized by the employer and not of such character or made under circumstances reasonably calculated to generate the conclusion that they are an expression of his policy, fail to constitute interference with the employees in the exercise of their right of self-organization, within the intent and meaning of the Act." *Labor Board v. Fairmont Creamery Co.*, 144 F.2d 128, 129 (10th Cir. 1944).

In the instant case there is nothing whatever in the record to indicate that Bash's statements represented respondent's policy. The Board's characterizations of his words as establishing the motives and intentions of the corporate respondent are gratuitous and ridiculous (R. 82-83).

Furthermore there is nothing to show any authority in Bash to make any statement binding on respondent. *Labor Board v. Russell Mfg. Co.*, 187 F.2d 296 (5th Cir. 1951); *Labor Board v. Hinde & Dauch Paper Co.*, 171 F.2d 240 (4th Cir. 1948).

In many cases in the Courts of Appeals findings based on immeasurably greater evidence have been overturned, where the Board sought to fasten on employers responsibility for the views of supervisors. Thus in *Labor Board v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947) the Court refused to hold the corporate employer had violated

the Act even though its General Manager had made statements much similar to those made by Bash here. In *Labor Board v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946) the Court overturned a finding by the Board of coercion even though a number of supervisors had made anti-union statements over a 15-month period. And in *Labor Board v. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir. 1944) a whole course of anti-union talk was held not violative of the Act, because it was not coercive in fact. Cf. *Labor Board v. Scullin Steel Co.*, 161 F.2d 143 (8th Cir. 1947).

Just as in the *Montgomery Ward* case, supra, the Board has made "insubstantial findings of fact screening reality" when it held that respondent would resort to any measures necessary to rid itself of ACA, and the like. The fact is that there was no evidence whatsoever in the record which would support any such conclusions; they are made out of whole cloth.

V.

The Omnibus Cease and Desist Order Must Be Denied Enforcement in Any Event

Paragraph 1(b) of the cease and desist order is a "boiler plate" provision that is frequently incorporated in Board decisions. Repeatedly the courts have stricken this paragraph, and this Court has denominated this paragraph as "all inclusive" and as "an omnibus cease and desist order."

The law of this circuit is clearly set forth in *Labor Board v. Kinner Motors, Inc.*, 152 F.2d 816 (9th Cir. 1946), involving the same paragraph although there numbered 1(c):

"1(c) of the order is all inclusive of the statement of

employee rights contained in § 7 of the Act. In our opinion such order is directly in conflict with the salutary statement of the Supreme Court in *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426 wherein it is said (p. 435), ‘* * * But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged * * *.’

“In *May Department Stores Co. v. National Labor Relations Board*, 326 U.S. 376 * * * it is held that an omnibus cease and desist order will not be approved unless there is a ‘clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.’

“The Board’s order in this case is ordered amended by striking paragraph 1(c).”

The Board also struck any reference to this paragraph in the notice that was to be posted. To the same effect are *Labor Board v. Walt Disney Productions*, 146 F.2d 44 (9th Cir. 1944), cert. den. 324 U.S. 877; *Richfield Oil Corp. v. Labor Board*, 143 F.2d 860 (9th Cir. 1944); *Labor Board v. Gilfillan Bros., Inc.*, 148 F.2d 990 (9th Cir. 1945); *Labor Board v. National Biscuit Co.*, 185 F.2d 123 (3rd Cir. 1950); *Labor Board v. Lipshutz*, 149 F.2d 141 (5th Cir. 1945).

The Board’s decision includes no finding of the type required by these cases.

Furthermore, the record affirmatively shows that the necessary findings could not be made in this case. This is true even if all the Board’s findings were to be accepted.

They show very little; at most: (1) some employees were told that they were "discharged" or "fired" when they were on strike, and (2) some statements were made showing one individual's antipathy to the ACA and especially his personal opinion of Communist infiltration in the ACA.

Even the limited record made before the Board shows that respondent was recognizing the rights of its employees guaranteed by the Act. It repeatedly advised its employees that their rights under the Act would be respected and told them that respondent wished to bargain with whatever union was certified as soon as the Board would resolve this question (R. 222-223, 269-271). In other ways it frequently made it clear to its employees that their rights under the Act were protected (for example, R. 403, 404). True, a minor supervisor who had long been a member of the ACA clearly indicated his distaste for the ACA as it was operating in January of 1949. It is to be noted, however, that according to the finding of the Trial Examiner who heard the testimony and observed the witness and the reaction of the ACA workers, Bash's statements were equivocal and contained no threat of reprisal or force or promise of benefit, so as to render them inadmissible under section 8(c) of the Act (R. 40-42). Furthermore, even Bash said, while making one of the statements relied on by the Board, that he believed that unions were a good thing and that the company would have recognized the ACA, whether or not the leaders were communists, if they had just complied with the law and obtained certification by the Board (R. 371-372). Even Bash fully recognized the right of the employees to strike, for he told Wheeler and Guerrero, "I know you are going to make me reinstate Chuck Jones, now get down

there on the bricks [the picket line] with the rest of them and make me do it" (R. 378-379).

The record further shows that in this case the Board excluded the issue with respect to the facts on which an omnibus cease and desist order depends. Thus the Board struck the ninth defense of respondent (R. 126-27). It refused to consider evidence with respect to the long history of friendly collective bargaining relations between respondent and the ACA (R. 403, 404, 409), which continued up until the time that a question arose as to whether the ACA or the IBEW should be recognized, when the ACA refused to comply with the National Labor Relations Act and thus precluded settlement of the representation question (R. 268-70, 409-15). It even further narrowed its investigation with respect to respondent's general acceptance of the principles of the Act by declining to hear evidence regarding its relations with the representatives of its employees during the period from August, 1948, until January, 1949 (R. 277, 410-12). If the issue had been raised and was properly before the Board, it would have had to hear evidence on these issues before making findings. *Pacific Gamble Robinson Co. v. Labor Board*, 186 F.2d 106, 109 (6th Cir. 1950); *Labor Board v. Montgomery Ward & Co.*, 157 F.2d 486, 491-93 (8th Cir. 1946).

The record on which the Board relies thus shows that it refused to consider the issue and failed to make the findings necessary to support a paragraph such as 1(b). Under these circumstances we submit this Court's decisions in the *Kinner* and *Richfield* cases preclude enforcement of paragraph 1(b).

CONCLUSION

We have shown that the affirmative order should be denied enforcement and set aside. The crucial finding of fact on which the Board's affirmative order depends is not supported by substantial evidence on the record considered as a whole. The order is punitive rather than remedial. It is contrary to law because the strikers violated their obligations to work at the time and place they selected for their refusal to work. We have shown the portion of the order relating to the statements of Bash should be denied enforcement and set aside. No charge was filed with respect to this alleged unfair labor practice. The crucial findings of fact are not supported by substantial evidence on the record considered as a whole. The omnibus cease and desist order must be denied enforcement and set aside. The finding of fact required to support such an order has not been made by the Board. There is no basis for any such finding in the record. Even if these grounds for denying enforcement and setting aside the order did not exist, enforcement would have to be withheld, further evidence adduced, and the record reconsidered. The facts as to who filed the charges and the facts relating to the appropriateness of any affirmative relief, as well as facts respondent sought to submit with respect to the availability of the jobs to the strikers, would still have to be considered.

We respectfully submit that this Court should deny enforcement of the Board's order and set it aside in whole in accordance with Section 10(e) of the Act.

Respectfully submitted,

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San Francisco,
June 29, 1951.



Appendix

LABOR MANAGEMENT RELATIONS ACT, 1947

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

FEDERAL COMMUNICATIONS ACT (47 U.S.C.)

Sec. 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; * * *

§ 217. **Agents' acts and omissions; liability of carrier.**

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure

of such carrier or user as well as that of the person. (*June 19, 1934, c. 652, § 217, 48 Stat. 1077*)

§ 501. **General penalty.** Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term of not more than two years, or both. (*June 19, 1934, c. 652, § 501, Stat. 1100*)

CALIFORNIA PENAL CODE

Sec. 638. Every agent, operator, or employee of any telegraph or telephone office, who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph or telephone, is guilty of a misdemeanor. * * *

No. 12735

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WIDE WIRELESS, LTD., RESPONDENT

FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12736

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GLOBE WIRELESS, LTD., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is filed to clarify certain misconceptions which pervade respondent's brief.

I

Respondent states the crucial issue to be whether the 19 employees *could* have had their jobs back before being replaced. This issue would be material if the employees had remained merely economic strikers. Respondent, however, *discharged* the employees promptly upon their going on strike.¹ A striking employee who, before he has abandoned the strike and asked for his job back, has been discharged outright

¹ The Board's finding that these employees had in fact been discharged finds ample support in the record. See main brief, pp. 5, 6, 7-8, 32-33, and record references there cited.

for going on strike, is by the act of discharge injured in the exercise of his rights under the Act, in that his employer has acted to terminate his employment notwithstanding the statutory protection which the strike enjoyed.

Such an employee thus differs from a mere economic striker whose injury arises only if he is discriminatorily denied reinstatement upon his request. One unlawfully discharged is therefore entitled to restoration of his position as at the time of the discharge, regardless of whether he has thereafter been replaced, and irrespective of whether he has asked the employer to rescind the unlawful discharge.²

In the instant case, since the employees were *discharged* for going on an economic strike, the "crucial issue" is not whether they were replaced, but whether their action in striking was so illegal as to strip them of the protection which the Act normally extends to economic strikers. See main brief, pp. 21-24, and see *infra*, Point IV.

II

Respondent's confusion of the rights of "dischargees" with those of "economic strikers" apparently also accounts for its misreading of the Board's

² An employee who has been unlawfully "fired" is not required to undergo the presumably useless act of asking the employer for his job. He is entitled to act on the belief that the employer meant what he said. An economic striker, on the other hand, has stopped work of his own volition and (unless, as here, he is thereafter discharged), must request reinstatement. *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 792 (C. A. 9), certiorari denied, 312 U. S. 678; *Eagle-Picher Mining & S. Co. v. N. L. R. B.*, 119 F. 2d 903, 913-915 (C. A. 8).

order. Contrary to respondent's repeated statement (Resp. Br., pp. 6, 22, 52) the order (R. 91-95) requires an immediate offer of reinstatement; *back pay*, however, is conditioned upon the date of the abandonment of the strike. The reason for conditioning the amount of back pay but not the offer of reinstatement is clearly stated in the Board's decision (R. 92-93), and is apparent from the considerations discussed in Point I, *supra*. The *discharge* was an unfair labor practice; hence the employees are entitled to an offer of reinstatement. However, at the time of the discharge they were also on strike and hence they did not begin to sustain losses in wages until they abandoned the strike.³

Respondent also contends that the order is too broad. The broad cease and desist order of which respondent complains would be valid even if respondent had violated only Section 8 (a) (3)—see, *N. L. R. B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4)—or even if respondent had violated only Section 8 (a) (1) in the manner here found—see *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 861-862 (C. A. 7); *N. L. R. B. v. Bailey Co.*, 180

³ Respondent's observation that the back-pay order is indefinite as interlocutory is altogether correct but quite irrelevant. The courts have long recognized that back-pay orders after court enforcement are subject to the usual post-decree proceedings before the Board for determination of the specific amounts due under the order as enforced. *N. L. R. B. v. Carlisle Lumber Co.*, 99 F. 2d 533, 539 (C. A. 9), certiorari denied, 306 U. S. 646; *N. L. R. B. v. Norfolk Shipbuilding Co.*, 172 F. 2d 813, 816-817 (C. A. 4); *Wallace Corp. v. N. L. R. B.*, 159 F. 2d 952, 954-955 (C. A. 4); *N. L. R. B. v. Bird Machine Co.*, 174 F. 2d 404, 405-406 (C. A. 1).

F. 2d 278, 280 (C. A. 6). *A fortiori*, the order is valid where respondent has violated both sections.

III

Respondent's attack upon the Board's jurisdiction rests on the alleged invalidity of the charges. The charges appear on their face (R. 5-8) to be executed by the individual complainants, not by the union, and the union derives no direct benefit from this proceeding. Consequently, any evidence as to the union's role in the preparation of the charges is irrelevant under the *Augusta* and *Clausen* decisions cited in our main brief, p. 35, and ignored in respondent's brief.

Respondent's basis for attacking the complaint as unsupported by the charges is difficult to grasp. Respondent's contention appears to be that the six-month period of limitations bars the Section 8 (a) (1) allegations of the complaint. But the Board in its complaint is not limited to the violations alleged in the charge. On this point, to the authorities cited in our main brief, pp. 27-28, may now be added *N. L. R. B. v. Westex Boot & Shoe Co.*, 28 L. R. R. M. 2220 (C. A. 5, decided June 25, 1951). The record establishes that the complaint itself issued within the six-month period, thus giving respondent timely notice of the violations with which it was charged.

IV

Respondent's contention that the employees violated the Federal Communications Act is treated at pp.

21-23 of our main brief.⁴ Respondent now argues that a California statute outlaws the strike. Such a contention would at once raise a constitutional question since the statute as thus interpreted would unlawfully invade a federally protected right. *Amalgamated Assn. v. Wisc. E. R. B.*, 340 U. S. 383, 389-399. However, the court need not grasp that nettle since it is plain from a fair reading of the statute (quoted at Resp. Br., p. 16) that it was not intended to cover a strike situation.

Respectfully submitted.

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JULY 1951.

⁴ Respondent attempts to buttress its argument under that Act by relying on Section 217 which renders respondent liable for acts of an employee committed *within the scope of his employment*. The italicized phrase reveals both the purpose of the section and its inapplicability to employees on strike. Respondent's free confession that it "unlawfully breached its duty as a public utility" (Resp. Br., p. 47), has a hollow ring in view of the apparent absence of any action ever brought against it for such self-confessed "breach." We rather suspect that respondent instead of confessing liability would vigorously argue that strike action **was** outside the intent of the section.

The first thing I noticed when I stepped
out of the car was the cold. It was a
sharp contrast to the warm blanket I
was sitting under. I looked up at the
dark sky and saw a few stars. I
felt a sense of peace and solitude.
The night was quiet, with only the
soft hum of the car engine and the
rustle of leaves. I took a deep
breath and felt the cool air fill my
lungs. I was alone, but I felt
connected to the world around me.
The stars were so bright, and the
moon was so full. It was a
beautiful sight, and I knew I
was in the right place. I closed my
eyes and let the night embrace me.
I was home.

No. 12,737

IN THE
United States Court of Appeals
For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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FILED

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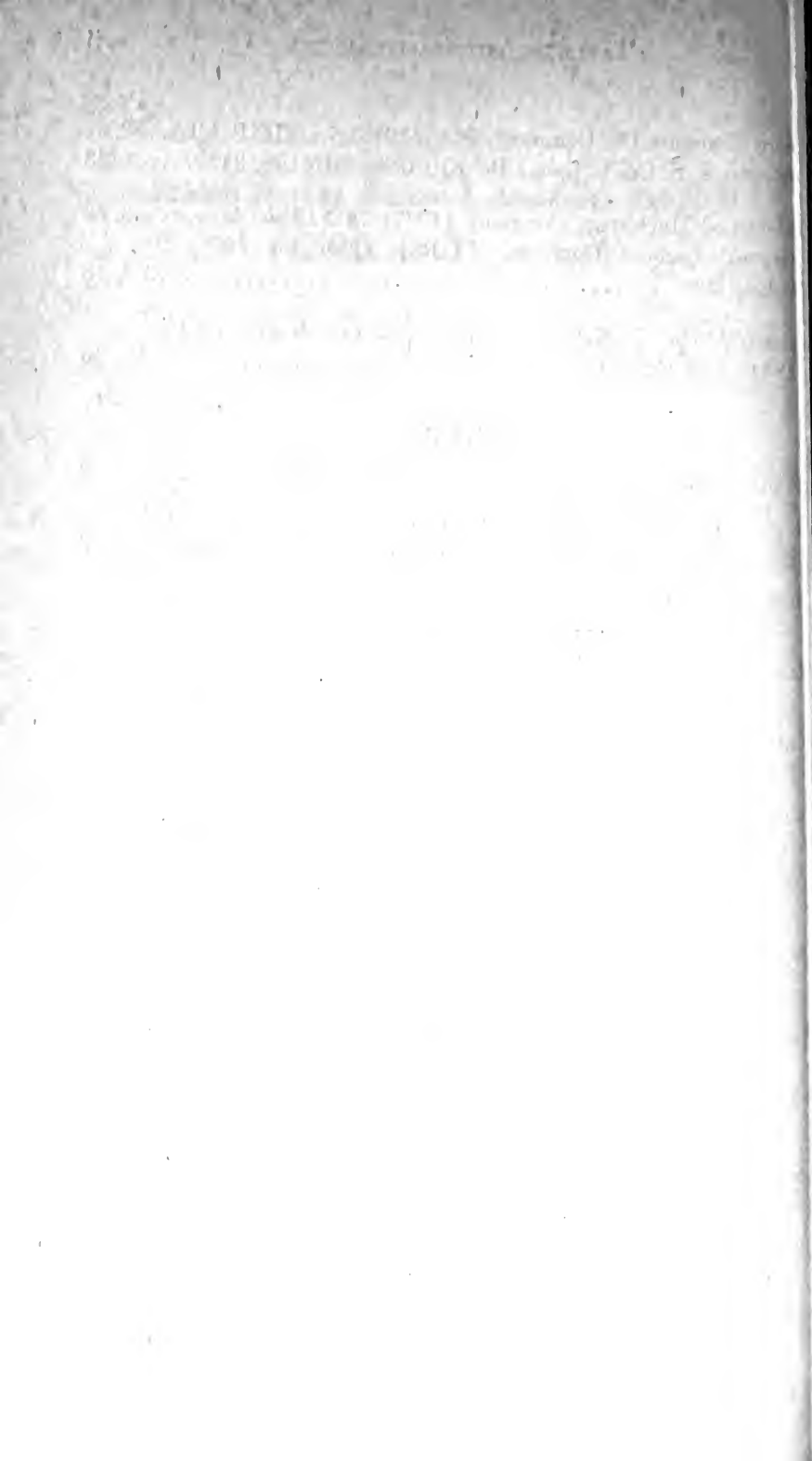
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No. 12,737

IN THE

**United States Court of Appeals
For the Ninth Circuit**

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

Following a two months' strike attended by violence and disorder at the Richmond, California, refinery of petitioner Standard Oil Company of California (hereafter called "the Company"), the Company discharged 62 strikers. Oil Workers International Union, CIO (hereafter called "the Union"), filed charges with the National Labor Relations Board (hereafter called "the Board") alleging that by the discharges the Company had committed an unfair labor practice (R. 427, 430, 436). Pursuant to the charges, the Board issued a complaint against the Company as to 56¹

¹The complaint originally named 60 complainants, but the complaint was dismissed as to 4 during the hearing before the Board's trial examiner.

of the persons discharged (hereafter called "complainants") alleging violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, (hereafter called "the Act")² (R. 442). The Company filed an answer denying the alleged violations (R. 449). After a hearing the Board issued its decision and order dismissing the complaint as to 13 complainants and ordering the Company to reinstate the remaining 43 (R. 208). The Company petitioned this Court to review and to vacate and set aside the Board's order and decision (R. 4504). The Board answered the petition and requested enforcement of the order (R. 4517).

The Company is aggrieved by the order of the Board which is a final order, granting in part the relief sought by the Union against the Company. The unfair labor practice in question is alleged to have been engaged in in the City of Richmond, County of Contra Costa, State of California, within this district (R. 444). The Company transacts business in the State of California and elsewhere within this district (R. 443). Said petition was filed pursuant to, and this Court has jurisdiction to review the Board order under the provisions of section 10(f) of the National Labor Relations Act, as amended.³

This review of Board action is governed by the Labor Management Relations Act, 1947 (29 USCA, sec. 141 et seq.), and the Administrative Procedure Act (5 USCA, sec. 1001, et seq.), and requires consideration of the record as a whole to determine whether the Board's findings

²29 USCA sec. 158(a)(1), (3).

³29 USCA sec. 160(f).

and conclusions are supported by substantial evidence (*Universal Camera Corp. v. N.L.R.B.* (Feb. 26, 1951) 95 L.Ed. 306; *Pittsburg S. S. Co. v. National Labor Relations Bd.* (6 Cir. 1950) 180 F.2d 731, affirmed (Feb. 26, 1951) 95 L.Ed. 319).

STATEMENT OF THE CASE.

This review involves the Company's right to discharge 43 employees who, with 19 others, were discharged after a strike by approximately 3,600 employees at the Company's Richmond, California, refinery in September and October, 1948. The evidence covers an extended period of general violence and disorder in addition to the particular misconduct in which each of the complainants was involved. The record consists of over 4500 pages, the testimony of 144 witnesses, and over 100 exhibits.

Because the Board mistook the issue to be decided and failed to consider the record as a whole, its findings do not correctly show the facts established by a preponderance of the evidence or reflect many of the undisputed material facts. It did not consider the evidence to determine whether the Company acted reasonably or lawfully. Neither did it weigh the evidence to determine the probability of misconduct by the complainants in accordance with the preponderance of the testimony. Its approach is based on the assumption that the Company violated the law and, to avoid the penalty of reinstatement with back pay, had the burden of establishing the criminal guilt of each of the complainants.

The Board found, under the heading "Background" (R. 241-243), that preceding the discharges the Union called a strike which continued from September 3d to November 8, 1948. The record also shows that a prolonged campaign of assaults, property damage, sabotage and organized intimidation coincided with the strike and preceded the discharges. The Board ignores this entirely. In fact, the attempt by the Board's trial examiner to treat the complainants more or less alphabetically and separately without reference to the over-all circumstances has resulted in many inconsistent findings⁴ and unusual disparity between the findings and the record.

To determine "the reasonableness and fairness" of the Board's decision, the reviewing court is required to canvass "the whole record" (*Universal Camera Corp. v. N. L. R. B.* (Feb. 26, 1951) 95 L.Ed. 306). In aid of the

⁴Compare the finding (R. 258-259) that "Regarding what transpired on October 5, Anschutz credibly testified * * * that none of the cars were blocked by picketers or anyone else; that no employee or any car was prevented from entering the lot; and that all cars were permitted to enter the lot without molestation to their occupants or damage to the car" with the findings (R. 370) relating to the same time and place that "a great deal of rowdiness went on at the parking lot that day. Several men were arrested and several cars were damaged," and (R. 397) that "Police Officer Baroni testified credibly that he saw Vetter break the window of Dawson's car as it was entering the parking lot * * *."

Compare the finding (R. 248) that "Thomas Ogden * * * testified and the undersigned credits * * * [his] testimony" with the finding (R. 383) that "Ogden's testimony is worthy of no credence whatsoever and the undersigned so finds."

Compare the finding (R. 254) that "The undersigned was favorably impressed with the frankness and sincerity with which * * * [Patrick A.] MacDonald * * * testified" with the finding (R. 365-366) that Patrick A. MacDonald did *not* testify in an "honest and forthright manner."

Court's review of a very voluminous record, we state the facts as fully as necessary, yet as briefly, as the record will permit.

THE FACTS.

For several years prior to 1948, the Company dealt with the Union as collective bargaining representative of some of the employees at the Company's refinery at Richmond, California. To enforce a demand for higher wages the Union called a strike on September 3, 1948 (R. 463), and immediately established picket lines. It is undisputed that the strike was an economic strike.

The Union secretary testified to a course of dealing between the Union and the Company which demonstrated a singular absence of antiunion bias on the part of management (R. 462-474).⁵

Both the secretary of the Union and the Company's manager testified that bargaining on the issues in dispute continued during the strike until near the end of October, 1948, when a Labor Board election was ordered (R. 463-466, 4335). Thereafter, informal meetings were held to discuss reinstatement of the employees on strike. The Union secretary testified that at these meetings the Com-

⁵"The employer is entitled to have its conduct considered in the light of this history, with its complete absence of hostility to the union" (*Pacific Gamble Robinson Co. v. National Labor Rel. Bd.* (6 Cir. 1950) 186 F.2d 106, 109). See also *Peninsula & Occidental S. S. Co. v. National Labor R. Bd.* (5 Cir. 1938) 98 F.2d 411, 415; certiorari denied 305 U.S. 635; and *Boeing Airplane Co. v. National Labor Relations Board* (10 Cir. 1944) 140 F.2d 423, 435.

pany representatives stated that all strikers would be put back to work except a few who "had engaged in certain activities which they didn't consider were good for an employee of the Company to engage in" (R. 472), and which "made it necessary for them not to rehire certain people" (R. 469).

R. K. Rowell, general manager of the refinery, who made the final decision to discharge the complainants, testified at length. His testimony is not contradicted in any respect and stands unimpeached. He testified that he had the responsibility of operating the plant in a safe manner and to see that it was properly protected and safeguarded (R. 4387). The refinery includes cracking plants for synthetic gasoline manufacture under extremely high pressures and high temperatures, a hazardous operation (R. 4333).

Prior to the strike on September 3, 1948, over 3,900 nonsupervisory or classified employees were employed in the refinery (R. 4336). The Company had been negotiating with the Union when the current contract expired and the strike was called (R. 4334). On the first shift, after the strike was called, 277 nonsupervisory employees continued to work (R. 4339; Resp. Exh. 87). Almost daily thereafter the working force increased until 2,435 men were working when the strike was terminated by the Union on November 7, 1948 (Resp. Exh. 87). No new employees nor anyone not on the Company payroll prior to the strike was employed during this period (R. 4342-4343).

At the beginning of the strike there were not many men on the picket lines, it being just prior to a holiday (R. 4341). Within a few days the number of pickets at a gate

increased to between 50 and 200 (R. 4342). Prevented by mass picketing from using the gates, men who came into the refinery to work came over the fence, under the fence, around through a remote area in the rear of the refinery, by boat and one by airplane (R. 4339). Workers who got into the refinery stayed in, slept and were fed in the refinery (R. 4340).

Rowell testified that, because of the mass picketing and threatened violence, on September 10, 1948, the Company applied for and obtained a temporary restraining order from the Superior Court in Contra Costa County (R. 4345). The order limited the number of pickets to four at a gate and prohibited congregating, gathering or massing in front of or within 200 yards of the gates (Resp. Exh. 40).

On the following Monday, September 13th, some A. F. of L. workers returned to work at the refinery. Mobs gathered on Standard Avenue leading to the refinery and attempted to prevent the workers from coming into the plant (R. 4341). Other witnesses elaborated on these events and in addition testified that on the following day, September 14th, an even larger mob barricaded the streets, rioted and was dispersed only after the use of tear gas by the city police (R. 2927, 3050-3056, Resp. Exh. 43 and 92 [rejected]).

On the mornings of October 4th, 5th and 6th, strikers congregated at the entrance to the parking lot near the refinery administration building.⁶ This lot was being used

⁶See "Mass demonstrations at the administration parking lot" *infra* pp. 52-57.

by nonstriking office and laboratory workers. Each day the mob grew larger and more vicious (R. 3081, 3088, 3095). On the third morning there was a riot (R. 4361). The participants in the disorder threatened and assaulted employees (R. 3539, 3802, 3808), cursed office girls (R. 1922, 2855), physically blocked the entrance (R. 2883, 3089, 3460, 3095), smashed automobile windows (R. 3082, 3091, 1876), and fought with and injured a number of policemen (R. 3090, 3113). The mob dispersed only when the non-striking office and laboratory workers had gone to work or no longer attempted to do so.

After the first morning of violence at the parking lot, to secure evidence of violation of the restraining order the Company employed cameramen to take photographs including motion pictures (R. 4361). The motion picture shows the riotous character of the demonstrations (Resp. Exh. 43), and it and other photographs were shown to the workers in the plant to identify the participants (R. 4362, 4397). Contempt charges were filed against all persons identified (R. 4362, 4384; Resp. Exh. 81, 83) and of these 25 employees were discharged. The Board has ordered reinstatement of 14 of the employees. Of these, complainants Anschutz, Borreani, Emmanuele, Grothues, Hammon, Higginbotham, Hollis, McLaughlin, Nelson, Odgen, Peterson and Wyatt were among those adjudged guilty of contempt of court for their part in these activities and fined (R. 147-153, 160-206). As to the other two Gillespie and Polson, the contempt charges were dismissed.

About this time, a number of strikers pursued an automobile occupied by persons assisting nonstrikers to return to work. This automobile was wrecked and its occupants,

including a young woman, were chased into a swamp with cries of "Get the sons of bitches. Get them out of there, those scab strike breakers" (R. 4171). Among the pursuers and involved in the accident were the complainants Dausy and Frank Gayanich.⁷

A few days later three pickets blocked a railroad track and prevented a locomotive from entering the refinery.⁸ One of the pickets told the police "he would not move, that he would lay down on the track first" (R. 3123). The three pickets were the complainants Bradley, Brock and Gunter. They were charged with contempt and convicted (R. 160).

Following these events, a general campaign of vandalism was directed at working employees. Forty-six homes were damaged by breaking of windows and smearing with paint or creosote. Sixty cars were damaged, windows being broken, backs of cars in some cases being smashed, tires and upholstery slashed (R. 4363). During this period, according to reports received by Rowell and substantiated by the evidence, employees coming into the plant were stoned, pursued and molested (R. 4364).

Rowell's testimony regarding the repeated violence was corroborated by J. L. Creighton, the Company's chief special agent who was in charge of the protection of Company property (R. 2903-3034). The Board found that Creighton was a forthright and honest witness (R. 345). Rowell's testimony was further corroborated by other eye witnesses.

⁷See "Pursuit out Castro Street on October 4th," *infra* pp. 62-66.

⁸See "Obstruction of railroad track on October 6th," *infra* pp. 68-69.

In one incident the cars of A. F. of L. members returning from a Union meeting were battered and smashed as they crossed the picket line at the refinery gate.⁹ A fight followed. The pickets claimed they were informed in advance that the workers were returning, and the pickets and their "reserves" were waiting for them (R. 4089, 4365; Resp. Exh. 27). The complainants Lods and MacDonald were among the group waiting at the gate. A few days later, five employees were assaulted while attempting to return to work by driving over a railroad track into the refinery before dawn.¹⁰ They were clubbed, kicked and stoned (R. 4006-4008, 4025). Undisputed circumstantial evidence placed a group of the complainants at the remote scene of the assault at the moment it occurred. In this group were the complainants Alcaraz, Coleman, Martinez, Maczkowski, Ogden and B. Vetter whom the Board orders reinstated. Autry, as to whom the Board refused to issue a complaint, and Pat MacDonald, as to whom the complaint was dismissed by the Board, were also in the group.

At another time, when a car crossed the picket line, a rock fight started in which the complainants Donaldson and Ottino admitted participation.¹¹

During this period a taxicab was followed from the refinery and overturned by a group of men (R. 2734). There were additional assaults on workers trying to get to work (R. 3866, 4295). A police car patrolling in the

⁹See "Assault at Gate No. 16 on October 8th," *infra* pp. 70-72.

¹⁰See "Yacht Harbor Assault on October 12th," *infra* pp. 74-79.

¹¹See "Rock throwing at Gate No. 1 on October 8th," *infra* p. 82.

vicinity of the refinery in the middle of the night was stopped by a gang of men and ordered to identify itself when going by "and, better yet, to get off the street" (R. 3630).

Ernest F. Phipps, acting Chief of the Richmond Police Department, also testified at length to the campaign of intimidation, violence and vandalism (R. 3035-3171). Phipps testified that the campaign of home damage and automobile wrecking reached its peak about October 24th when the police received approximately 20 complaints of window breaking, cars overturned, paint on houses, and creosote thrown through windows during the night (R. 3133-3134). Within approximately a 24-hour period, 21 arrests were made (R. 3134, 4367), and thereafter reports of vandalism diminished (R. 4367).

Apprehended by the police at this time were the complainants Brakke, whom the Board orders reinstated, and John Gayanich, as to whom the complaint was dismissed, in a car with blackjacks, a slingshot and an assortment of rocks (Resp. Exh. 48). Less than 24 hours later, Brakke and thirteen other complainants were found to be involved in an apparent ambush for nonstrikers after the group had attacked a taxicab using the highway near the refinery late at night.¹² In this group in addition to Brakke were the complainants A. Gayanich, Collinsworth, Dausy, Snead, Dodson, Bushong, Langensand, Pittman and Ogden whom the Board orders reinstated, Wyrick and Hershberger as to whom the complaint was

¹²See Ambush on Winehaven Road on October 25th," *infra* pp. 84-88.

dismissed, and Autry, as to whom the Board refused to issue a complaint.

A few hours later, the complainants Hardin and Kelly were arrested by the police after following and stopping another taxicab.¹³

During the strike, Rowell testified, attempts were made to sabotage the refinery by breaking and opening certain locked gas valves (R. 4353-4355), by simultaneously pulling a switch outside the refinery on the main power plant (R. 4356), and later by opening the bottom valves on five 60,000-barrel gasoline storage tanks (R. 4357). Fires occurred on two different sides of a pile of lumber in the northerly and westerly end of the refinery (R. 4357). A smoke bomb was found approximately 30 feet from tanks in the refinery where butane is kept in liquid state under pressure up to around 250 pounds (R. 4358). The Company offered a reward of \$5,000 in each incident. The rewards have never been claimed (R. 4360). However, one of the employees reported to the Company that the complainant Leighty had telephoned him while he was working and said "If you don't get out of there, I'm going to tell what I know about the gas valve" (R. 4041). Also, near the end of the strike, the police arrested the complainants Bright, Hall, Morgan and Vanek in a car following some nonstriking employees when they found upon searching the car a "smoke bomb", the size of a gallon can, identical with the one above mentioned (R. 3696, 3717-3720; Resp. Exh. 62).*

¹³See "Further Arrests on October 25th," *infra* pp. 91-92.

*See "Attempted Acts of Sabotage," *infra* pp. 94-96.

Rowell testified that at and near the end of the strike, there was a general state of confusion and terror among the men working in the plant (R. 4394). There was an atmosphere of terror around the refinery and around the homes (R. 4386; Resp. Exh. 92 [rejected]). In considering the discharge of the men involved, for the protection of the refinery and the people employed, this whole situation, including the general atmosphere of terror, was taken into consideration (R. 4386).

Reports received were checked by the Company's regular staff of three special agents charged with plant protection (R. 4399, 4414). A committee consisting of the general manager, the assistant general manager, the personnel director, the chief special agent and his assistant reviewed each case, and consulted with the Company's attorneys (R. 4372-4373). Almost all of the discharges were defendants in criminal cases or in contempt proceedings in which the Company was an adverse party and which involved the matters considered cause for discharge. For this reason, on advice of counsel, the Company refrained from attempting to interview the men involved (R. 4400, 4415).

Regarding the persons identified in the crowds at the administration parking lot on October 4th, 5th and 6th, and charged with contempt of court, the Company decided that all members of the mob should be discharged because, although a court order limited the number of pickets and prohibited violence, mobs had assembled, breaking windows, insulting and cursing employees and smashing cars, and it was impossible to determine who committed

specific acts (R. 4410). Exceptions were made in the cases of two men with exceptionally long service with the Company (R. 4384-4385). One of them was an officer of the Union with whom the Company bargained (R. 4384).

The Company investigated the rock-throwing fights between workers in the refinery and the men outside. It found that each rock-throwing incident had been preceded by an attack upon cars carrying workers into the plant. In each case such attacks were the cause of the ensuing fight (R. 4405). This was confirmed by eye witnesses (R. 3478, 3513, 4488; Resp. Exh. 19). Rowell felt that under the circumstances the men entering the plant were justified in attempting to protect themselves (R. 4406-4407). He did not think anyone could "expect a man to just stand by and take that abuse without some retaliation" (R. 4412).

The Company did everything possible to avoid and minimize violence. At the beginning of the strike, the Company urged all employees in the refinery not to engage in acts of violence (R. 4343; Resp. Exh. 88). Shortly after the strike began a bulletin was issued to supervisory employees outlining a procedure to be followed in avoiding violence of any kind in efforts to cross the picket lines (R. 4344; Resp. Exh. 34). On numerous occasions, Rowell admonished workers not to throw rocks, not to create any violence from the inside that might cause or add to the general terror in the vicinity (R. 4406). The city police were advised by the Company that they were privileged to enter the plant at any time to arrest anyone

throwing rocks at persons outside the gate (R. 3345). A special car from the Fire and Guard Department was assigned to patrol Castro Street, and floodlights were installed in the area adjacent to No. 1 gate around the boiler shop (R. 4415).

Of approximately 3,600 employees who remained away from work for various periods during the strike, a total of 62 were refused reinstatement because, in the Company's view, they were guilty of acts of violence and vandalism (R. 4412, 4372).

Rowell was satisfied that each of the 62 men discharged, from the information and evidence he had, had committed acts of violence, vandalism, or unlawful acts of some kind (R. 4385). This was his sole consideration in determining whether these people should be discharged (R. 4385-4386). He knew he operated a potentially hazardous plant, and he could not have vandals and hoodlums operating a complex piece of equipment that might be hazardous to both life and property (R. 4387).

Membership in the Union was not considered in determining whether to discharge any person (R. 4373). As to many of the persons discharged, the Company had no way of knowing whether they did or did not belong to the Union. Since, under the contract with the Union, there was voluntary checkoff of Union dues, the Company had only a partial list of Union members. A comparison between the list of discharges and the Union-dues-checkoff list shows that of the 56 complainants, 31 were on the checkoff list and 25 were not (R. 4380-4382; Resp. Exh. 95). Of the 67 Union stewards in the plant only 8 are

among the 56 complainants (R. 4377-4379; Resp. Exh. 94). Of the 23 Union officers in the plant only 2 are among the 56 complainants (R. 4376; Resp. Exh. 93).

The foregoing are the circumstances under which the Company discharged the complainants and the reasons for the discharges. A review of the evidence of the particular incidents in which the various complainants were involved is included in the "Third" point of the Argument herein, *infra* p. 51.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Board erred in denying the Company's motion to dismiss the complaint upon the ground that said complaint was issued contrary to law in that the Congress of Industrial Organizations, a national or international labor organization, of which the charging union, the Oil Workers International Union, C.I.O., is an affiliate or constituent unit, had not complied with the requirements of section 9(h) of the National Labor Relations Act, as amended.
2. The Board erred in ordering reinstatement of persons discharged in the absence of any evidence, substantial or otherwise, that the Company was guilty of an unfair labor practice under the Act.
3. The Board erred in assuming, without evidence thereof and contrary to the evidence, that discharged economic strikers were discharged for striking.

4. The Board erred in holding that misconduct by employees engaged in an economic strike is protected by the Act unless the misconduct is "of such a serious nature" in the opinion of the Board that it in its discretion should withhold reinstatement.

5. The Board erred in holding that the Company had the burden of proving that the persons discharged were guilty of serious misconduct.

6. The Board erred in holding that participation in mass picketing and mass obstruction of the entrances to the Company's refinery was not improper and was a protected concerted activity because there was no direct evidence that the participants gathered pursuant to a preconceived plan to so obstruct entry to the refinery.

7. The Board erred in ordering reinstatement of 15 persons who were discharged for mass picketing and violence in violation of a restraining order of a court of competent jurisdiction, and were thereafter convicted by said court of criminal contempt for said violations.

8. The Board erred in finding that each of the persons named in "Appendix A" (R. 233) to the Board's order did not engage in any improper, illegal or unprotected activity.

9. The Board erred in concluding, without finding any facts in support thereof, that the refusal to reinstate and the discharge of each of the persons named in "Appendix A" (R. 233) to the Board's order "were violative of the Act."

10. The Board erred in making each and all of the findings specified and set out verbatim in "Exceptions of

Respondent, Standard Oil Company of California, to Intermediate Report of Trial Examiner" numbered from 1 to 126, inclusive (R. 22-72), in that each and all such findings are contrary to the preponderance of the testimony and unsupported by substantial evidence on the record considered as a whole.

11. The Board erred in refusing to admit in evidence Respondent's Exhibit No. 92, consisting of parts of the front pages of sixteen newspapers published between September 13, 1948, and October 26, 1948, and circulated generally in the community in which the Company's refinery is located. Said exhibit was offered to show the effect on the community, the workers in the refinery and their families of the unlawful acts established by the evidence (R. 4371). The Company's general manager had testified that the "general atmosphere of terror around the refinery and around the homes" was taken into consideration in deciding to discharge the complainants (R. 4386). Upon identification of the papers constituting the exhibit and the offer in evidence, the following objection was made (R. 4371):

"Trial Examiner Myers. Any objection to that exhibit going in evidence?

Mr. Law. Yes, indeed.

Trial Examiner Myers. I will sustain the objection."

SUMMARY OF THE ARGUMENT.*First*

The complaint in the proceeding before the Board was issued pursuant to a charge filed by the Oil Workers International Union, CIO. It is conceded that the Union was "an affiliate or constituent unit of a national or international labor organization, Congress of Industrial Organizations" which was not at that time in compliance with the provisions of the Act requiring the filing of non-Communist affidavits. The Act specifically prohibits the Board from issuing such a complaint. As the Board was not empowered to issue the complaint, the Board's order based thereon is invalid and must be set aside.

Second

The Board has not proved a case for an order of reinstatement. No such order lies unless the employer has committed an unfair labor practice. An unfair labor practice cannot be assumed; it must be proved. The Board's conclusion that the Company violated the Act is not supported by evidence of any kind. The mere discharge of an *economic* striker, the only showing made by the Board, is not an unfair labor practice. The requirement that the Board must prove an unfair labor practice is not met by the mere assumption that a discharged *economic* striker was discharged for striking; and in this case there is no room even to assume that, when the Company refused re-employment to sixty-two out of several thousand striking employees after two months of violence, disorder, lawbreaking and contempt of injunction by hundreds of strikers, it discharged any of them merely for striking. In reliance upon the cases dealing with *unfair*

labor practice strikers discharged in furtherance of the unfair labor practice, the Board erroneously held that the Company has the burden of proving misconduct of *economic* strikers as an affirmative defense and that reinstatement depends on whether the misconduct was "sufficiently serious." The precedents used by the Board, predicated as they are upon a proved unfair labor practice, have no application to the instant case, where the primary issue is whether the employer has committed an unfair labor practice. Since an order of reinstatement must be predicated upon an unfair labor practice and the Board failed to prove that fact, the order of reinstatement must be set aside.

Third

Even on the erroneous theory that the Board was relieved from proving the commission of an unfair labor practice, the evidence produced by the Company conclusively refuted any possible assumption of its violation of the Act or inference of unlawful motive or purpose in its refusal to re-employ the complainants. The record shows the numerous occurrences of violence, vandalism and unlawfulness which led to the discharges, and the connection of the respective complainants with the occurrences. The preponderance of the evidence amply shows that the conduct of the complainants was unlawful, improper, and unprotected under the Act, and that the Company was fully warranted in discharging them for other than lawful strike activities. Even on the erroneous theory, therefore, that the Company had the burden of defense, the burden was overwhelmingly met and the Board's order of reinstatement must be set aside.

ARGUMENT.

FIRST: THE BOARD'S COMPLAINT WAS ISSUED PURSUANT TO CHARGES FILED BY A UNION ADMITTEDLY AN AFFILIATE OR CONSTITUENT UNIT OF A NATIONAL OR INTERNATIONAL LABOR ORGANIZATION NOT IN COMPLIANCE WITH THE NON-COMMUNIST AFFIDAVIT PROVISIONS OF THE ACT. THE ACT EXPRESSLY PROHIBITS THE BOARD FROM ISSUING SUCH A COMPLAINT. THE BOARD'S ORDER BASED THEREON IS INVALID AND MUST BE SET ASIDE.

Section 9(h)¹⁴ of the Labor Management Relations Act, 1947, provides:

“* * * no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.”

The validity of this provision was upheld by the Supreme Court in *American Communications Ass'n. v. Douds* (1950) 339 U.S. 382.

The Board issued its complaint against the Company in the proceedings which are the subject of this review on March 23, 1949 (R. 442-445). The complaint was issued

¹⁴29 U.S.C. sec. 159(h).

pursuant to a charge filed November 12, 1948, a first amended charge filed December 1, 1948, and a second amended charge dated February 9, 1949. These charges were received in evidence in the proceedings as General Counsel's Exhibits No. 1-A, No. 1-C and No. 1-E, respectively. Each charge states that the Union is an affiliate or constituent unit of a national or international labor organization, Congress of Industrial Organizations (R. 429, 432, 438).¹⁵

Each charge is sworn to by an International Representative of the Union.

The Board concedes that "the officers of the Congress of Industrial Organizations for the first time filed with the Board the non-Communist affidavits described in Section 9(h), on December 19, 1949, which date is subsequent to the issuance of the complaint in this case" (R. 4537).

The Company, by written motion, moved the Board for an order dismissing the complaint upon the grounds that it was issued contrary to said section 9(h) of the Labor Management Relations Act under the above stated facts (R. 119-120). The Board denied the motion (R. 212) because "Congress did not intend that complying labor

¹⁵The original charge and the first amended charge were filed by Oil Workers International Union, Local 561, CIO, and each contains the following (R. 429, 432):

"7. (Full name of national or international labor organization of which it is an affiliate or constituent unit:)

Congress of Industrial Organizations."

The second amended charge was filed by Oil Workers International Union, CIO, and contains the following (R. 438):

"5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization):

Congress of Industrial Organizations."

organizations affiliated with parent organizations such as the American Federation of Labor and The Congress of Industrial Organizations should be denied the processes of the Board because of the failure of such parent federations to comply with section 9 of the Act.”¹⁶

We submit, in the words of the United States Supreme Court, that “To sustain the Board’s contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.”¹⁷

In *National Labor Relations Bd. v. Postex Cotton Mills* (5 Cir. 1950) 181 F.2d 919, the Court held invalid and set aside a Board order predicated upon a complaint issued pursuant to a charge filed by Textile Workers Union of America, CIO, like the union here, affiliated with the Congress of Industrial Organizations, because the CIO, as here, was not in compliance with section 9(h) of the Act.

The *Postex* decision was followed by the Fourth Circuit in *National Labor Relations Bd. v. Highland Park Mfg. Co.* (4 Cir. 1950) 184 F.2d 98. The Court points out (p. 101) that there is “no occasion to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind,” and the Board’s order is set aside.

The Supreme Court granted certiorari in the *Highland Park* case on February 26, 1951, 95 L.Ed. 405.

¹⁶26 LRRM 1117, 1170.

¹⁷*Colgate Co. v. Labor Board* (1949) 338 U.S. 355, 363.

Here there is no question of fact. The Board established by its own exhibits in evidence that the Congress of Industrial Organizations is the "national or international labor organization of which [the Oil Workers International Union, CIO] is an affiliate or constituent unit" and that the Board issued its complaint pursuant to a charge made by the Oil Workers International Union, CIO, almost nine months before the Congress of Industrial Organizations complied with section 9(h).

We respectfully submit that the plain language of the statute requires that the Board order in this case be set aside as invalid.

SECOND: THE BOARD HAS NOT PROVED A CASE FOR AN ORDER OF REINSTATEMENT. NO SUCH ORDER LIES UNLESS THE EMPLOYER HAS COMMITTED AN UNFAIR LABOR PRACTICE. AN UNFAIR LABOR PRACTICE CANNOT BE ASSUMED; IT MUST BE PROVED. PARTICULARLY IN THIS CASE, THERE IS NO ROOM EVEN TO ASSUME THAT, WHEN THE COMPANY REFUSED RE-EMPLOYMENT TO SIXTY-TWO OUT OF SEVERAL THOUSAND STRIKING EMPLOYEES AFTER TWO MONTHS OF VIOLENCE, DISORDER, LAW-BREAKING AND CONTEMPT OF INJUNCTION BY HUNDREDS OF THE STRIKERS, IT DISCHARGED ANY OF THEM MERELY FOR STRIKING. IN AN ECONOMIC STRIKE CASE THE BOARD STILL HAS THE BURDEN OF PROOF OF AN UNFAIR LABOR PRACTICE, AND IT ERRED IN HOLDING (A) THAT THE COMPANY HAD THE BURDEN OF PROVING MISCONDUCT AS AN AFFIRMATIVE DEFENSE AND (B) THAT REINSTATEMENT DEPENDS UPON WHETHER THE MISCONDUCT IS "SUFFICIENTLY SERIOUS."

- 1. THERE IS NO EVIDENCE TO SUPPORT FINDINGS AGAINST THE COMPANY, AND THE REQUIREMENT OF PROOF IS NOT MET BY A MERE ASSUMPTION THAT DISCHARGED ECONOMIC STRIKERS WERE DISCHARGED FOR STRIKING OR FOR LAWFUL STRIKE ACTIVITY.**

Under section 10(c) of the Act, (29 USCA sec. 160(c)), a condition to the Board's authority to order reinstatement is proof by a preponderance of the evidence that the employer is guilty of an unfair labor practice.

The case made against the Company by the Board consisted *solely* in establishing the fact that in November, 1948, the Company discharged 62 of several thousand strikers. We submit that this lone fact, on the whole record, is insufficient to support the conclusion that in discharging 43 of the 62 discharged strikers the Company committed an unfair labor practice under either section 8(a)(1) or section 8(a)(3) of the Act.

We realize that we invite skepticism in making so summary a statement of the Board's case when the Court has before it a record containing more than four thousand pages of testimony. That, nevertheless, is the whole case against the Company. In reliance upon the brief testimony of a single witness¹⁸ the General Counsel rested. The Company moved to dismiss.¹⁹ The motion was denied.²⁰ The balance of the record of over 4,000 pages consists of the evidence of a month-long campaign of violence, vandalism, and intimidation, which terrorized a whole community, and the evidence of the complainants' connection therewith upon which the Company based its decision to discharge the complainants.

(a) There is no evidence to support a finding that the Company committed an unfair labor practice.

One hundred and forty-four witnesses testified. All but two of the 56 complainants testified. The Union president testified. The Union secretary testified. Yet there is nowhere in 4,000 pages of testimony and in over 90 exhibits any of the criteria to which the Board and the courts ordinarily look in cases of this kind to find indications

¹⁸R. 461-478: Before resting, the General Counsel called one other witness, the complainant George S. Davis. Davis admitted telling the Company's Assistant General Manager that if he crossed the picket line "You are liable to have a rock between your eyes and break your glasses" (R. 514). As to Davis the complaint was dismissed (R. 563).

¹⁹R. 540-552.

²⁰R. 563.

that the law has been violated.²¹ There is not a scintilla of evidence:

- (1) that the Company's management was hostile to the Union;
- (2) that any representative of the Company ever threatened any person because of his Union membership or activities;
- (3) that the Company sought to avoid dealing with the Union or any of its officials;
- (4) that the Company failed at any time to bargain or deal fairly and openly with the Union;
- (5) that before the strike or during the strike or at any time, the Company attempted to interfere with, restrain or coerce any of its employees in the exercise of their rights of self-organization;
- (6) that any of the 43 complainants ordered reinstated were particularly active or that many of them were at all active in Union organization or other lawful Union activities;

²¹Cf.:

National Labor Relations Board v. Cities Service Oil Co. (2 Cir. 1942) 129 F.2d 933;

National Labor Rel. Board v. Idaho Refining Co. (9 Cir. 1944) 143 F.2d 246, 248;

National Labor Rel. Bd. v. Laister-Kauffmann A. Corp. (8 Cir. 1944) 144 F.2d 9, 14;

National Labor Relations Board v. Reeves Rubber Co. (9 Cir. 1946) 153 F.2d 340, 341;

National Labor Relations Board v. Winter (10 Cir. 1946) 154 F.2d 719.

See: Third Annual Report of the National Labor Relations Board, pp. 81-88.

(7) that the Company had any reason to believe any of the 43 persons were particularly active in Union organization or other lawful Union activities;

(8) that as to many of the 43 persons the Company had any way of knowing whether they did or did not belong to the Union; or

(9) that the discharge of these 43 persons could, or that the Company had any reason to believe the discharge would, interfere with the self-organization of the Company's employees.

There is no showing of a pattern in the selection of the complainants to indicate any connection between their alleged Union membership and their discharge or between the act of striking and the discharges. There is to be found no material distinction between the 62 persons discharged and 3,600 other employees except in one particular—their participation in the campaign of intimidation and terrorism that coincided with the strike.

If in fact there was a violation of the law, we submit there would be some indication of it in all this evidence and the Board would not have had to base its case on pure assumption.

It has been pointed out that, together with other circumstances, the failure of an employer to go forward with evidence of his reasons for discharge, may give rise to an inference of an improper or unlawful motive. In this case, the Company did go forward, though the evidence offered by the General Counsel was manifestly insufficient to make out a *prima facie* case, and, we submit, the Company's motion to dismiss when the General Counsel

rested was erroneously denied. The Company presented substantial undisputed evidence of the lawful and valid reasons and motivating considerations for the discharges.

The Board, of course, has the burden of proving the charges against the Company.²² The courts have held that "The Company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof" (*Interlake Iron Corp. v. National Labor Relations Board* (7 Cir. 1942) 131 F.2d 129, 134; *Peoples Motor Express v. National Labor Relations Board* (4 Cir. 1948) 165 F.2d 903, 907).

In this case the Board recognizes that it has the burden of proof but says (R. 224):

"We hold that this requirement is met, as it is here upon a showing that the Respondent [Company] discharged the workers because of their strike activity."

An unfair labor practice is established and the requirement of proof is met only by a showing that the strikers were discharged for lawful strike activities, i.e., concerted activity protected by section 7 of the Act.

The Board statement that it met the requirement of proof is not true, first, because the only evidence is that the persons discharged were economic strikers and this alone is insufficient to show that they were discharged for striking or for lawful strike activity and, second, because the "showing" referred to is an assumption wholly

²²"The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act * * *" (NLRB Rules and Regulations, Series 5, Statements of Procedure, sec. 202.10).

untenable in view of the undisputed background of violence and disorder.

- (b) Proof that the persons discharged were economic strikers does not constitute a showing that they were discharged for striking or for lawful strike activity.

As applied to this case, in the complete absence of any other showing, the rule stated by the Board is that a mere showing that the persons discharged were strikers meets the burden of proof and satisfies the statutory requirements of preponderance of the evidence and substantial evidence on the whole record. The Board's theory is that because the discharged employee participated in a strike it will be assumed, without further evidence, that the employer discharged him for the lawful act of striking.

That theory was rejected by this Court in *National Labor Relations Board v. Citizen-News Co.* (9 Cir. 1943) 134 F.2d 970. The Court said (p. 974) :

“The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence.”

The *Citizen-News* case was quoted and followed by the Eighth Circuit in *National Labor Relations Bd. v. Montgomery Ward & Co.* (8 Cir. 1946) 157 F.2d 486, 493, and by the Fourth Circuit in *Peoples Motor Express v. National Labor Relations Bd.* (4 Cir. 1948) 165 F.2d 903, 907. In the *Montgomery Ward* case the Court held (p. 493) :

“The union activities of Skinner are not sufficient in themselves to support an inference that they were the cause of his discharge.”

The law regarding the employer's right to discharge is well settled. The “mere discharge of an employee is not an unfair labor practice” (*Joanna Cotton Mills Co. v. National Labor Relations Bd.* (4 Cir. 1949) 176 F.2d 749, 754). The National Labor Relations Act “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them” (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 45). As this court has held, the Act “did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation” (*National Labor Relations Bd. v. Union Pacific Stages* (9 Cir. 1938) 99 F.2d 153, 177). Membership in a union is not a guarantee against discharge,²³ and “the employee may be discharged for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated” (*National Labor Relations Board v. Condenser Corp.* (3 Cir. 1942) 128 F.2d 67, 75).

See also:

Associated Press v. Labor Board (1937) 301 U.S. 103;

²³*National Labor Relations Board v. Riverside Mfg. Co.* (5 Cir. 1941) 119 F.2d 302, 307;

National Labor Relations Board v. Mylan-Sparta Co. (6 Cir. 1948) 166 F.2d 485, 490;

National Labor Relations Board v. Fulton Bag and Cotton Mills (5 Cir. 1949) 175 F.2d 675, 677.

Martel Mills Corp. v. National Labor Relations Bd.
(4 Cir. 1940) 114 F.2d 624, 633;
Pittsburg S. S. Co. v. National Labor Relations Bd. (6 Cir. 1950) 180 F.2d 731; affirmed 19 LW 4136.

Participants in an economic strike as the complainants here were, are no more immune from discharge for misconduct than is a working employee.

As stated in *Hamilton v. National Labor Relations Board* (6 Cir. 1947) 160 F.2d 465 at p. 469: "If an employee engages in such conduct as would justify an employer in discharging him if a strike was not in effect, there is nothing in the Act to prevent such a discharge."

In *Labor Board v. Mackay Co.* (1938) 304 U.S. 333, the Court held that economic strikers retain the status of employees. The Court also held that (p. 345) "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers." The Court thus made it clear that an economic striker like a working employee was not immune from replacement, provided only that he was not discriminated against in violation of the statute.

In *Wilson & Co. v. National Labor Relations Board* (7 Cir. 1941) 120 F.2d 913, the Court considered the right of an employer to discharge participants in a strike, which, like the strike here, "was called without any fault on the part of the petitioner." The Court said (p. 923): "The sole duty resting upon petitioner at that time was to refrain from discriminating against them [the economic strikers] because of their Union activities or

their participation in the strike, and this duty was upon the assumption that the strike was conducted in a lawful manner.”

See also:

National Labor Relations Board v. Ohio Calcium Co. (6 Cir. 1943) 133 F.2d 721, 728;

National Labor Relations Board v. Draper Corporation (4 Cir. 1944) 145 F.2d 199;

National Labor Relations Board v. Indiana Desk Co. (7 Cir. 1945) 149 F.2d 987;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566;

National Labor Rel. Bd. v. Wytheville Knitting Mills, Inc. (3 Cir. 1949) 175 F.2d 238.

Thus, the mere showing, relied upon by the Board, that the persons discharged were economic strikers is wholly insufficient to support a finding that the discharges violated the Act. The Board had the burden of proving discharge for lawful strike activities at the beginning of these proceedings and the burden of proving that fact by “substantial evidence on the record considered as a whole” remain with it throughout the proceedings. That burden never shifted. (See: *Commercial Corp. v. N. Y. Barge Corp.* (1941) 314 U.S. 104, 110.) This requirement the Board never met.

(c) The “showing” relied upon by the Board is an untenable assumption under the facts of this case.

The evidence shows that the decision to discharge the complainants was made against a background of sabotage to the Company plant, physical assaults on em-

ployees, repeated damage to property and the terrorizing of an entire community. This makes an assumption of discharge for lawful strike activity impossible.

If an inference is to be drawn from the background of the discharges the facts cannot be ignored, as the Board has done here. The Board erred in excluding much of the evidence on the over-all pattern of lawlessness and its effect on the whole community. (See: R. 4371, 4151-4166, 4185-4191.) The Company's general manager had testified that the "general atmosphere of terror around the refinery and around the homes" was taken into consideration in deciding to discharge the complainants (R. 4386). One witness had testified "everyone in the city was terrorized" (R. 4204). In corroboration of this, to show public knowledge, interest and concern, the Company offered in evidence Respondent's Exhibit No. 92, consisting of parts of the front pages of sixteen newspapers published between September 13, 1948, and October 26, 1948, as follows:

PLAN X-DAY FOR BERLIN

MONDAY  **INDEPENDENT**
OVER 100,000 READERS DAILY
Richmond, California, Monday, Sept. 13, 1948

THE SPORTSMAN FINAL
Thirty-ninth Year No. 46

POLICE ASK STRIKE AID



THROUGH

RACES Tense Situation Marks Breaching Of Picket Lines

Fear of taking in a strike situation at Richmond's standard-bred racing track today was one of the main reasons why the Richmond police asked for strike aid from the city of San Francisco and the United States Marshal's office.

A situation there was not serious other than the fact that the police at the track are unable to handle the situation. The police at the track are unable to handle the situation. The police at the track are unable to handle the situation.

In addition, all Richmond pickets will be moved to the track, including those who are not on the list of pickets. The police at the track are unable to handle the situation.

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Newspaper Richmond Independent
September 13, 1948

NAKAGANSET

HAWTHORNE

Draftees Get 31-Day Notice

Enlistees who have been drafted for military service will receive a 31-day notice to report for duty. The notice will be sent by mail.

The notice will be sent by mail. The notice will be sent by mail. The notice will be sent by mail.

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SC. FIGHTING S. REFINERS

Change in Wind Saves Ojai As Thousands Flee

Ojai, Sept. 14.—A calm drizzle in the morning, but a strong wind in the afternoon, saved the Ojai fire from becoming a disaster. The fire, which started in the morning, was quickly extinguished by the fire department. The wind, which was blowing from the north, kept the fire from spreading to the south. The fire department, which was called in at 10:30 a. m., arrived at the scene at 11:30 a. m. and quickly put out the fire. The fire, which was about 100 feet long and 50 feet wide, was caused by a lightning strike. The fire department, which was called in at 10:30 a. m., arrived at the scene at 11:30 a. m. and quickly put out the fire. The fire, which was about 100 feet long and 50 feet wide, was caused by a lightning strike.

Supervisors Delay Bond Issue Move

Richmond, Sept. 14.—The Richmond Board of Supervisors today delayed a move to issue bonds for the construction of a new city hall. The board, which met in a special session today, decided to postpone the issue of bonds until next month. The board, which is composed of five members, is currently considering the issue of bonds for the construction of a new city hall. The board, which is composed of five members, is currently considering the issue of bonds for the construction of a new city hall.

Water Uncertainty May Shrink Land Values in Valley

Richmond, Sept. 14.—The uncertainty over the future of the water rights in the Richmond Valley may lead to a sharp decline in land values. The water rights, which are owned by the state, are currently being contested by the local landowners. The water rights, which are owned by the state, are currently being contested by the local landowners. The water rights, which are owned by the state, are currently being contested by the local landowners.

Dr. Degnan Named Medical Director of Contra Costa

Richmond, Sept. 14.—Dr. J. H. Degnan, a prominent physician in the Richmond area, has been named medical director of the Contra Costa County Health Department. Dr. Degnan, who has been practicing medicine in the Richmond area for many years, was named to the position by the board of health. Dr. Degnan, who has been practicing medicine in the Richmond area for many years, was named to the position by the board of health.

Stocks Mixed And Quiet On Opening

Richmond, Sept. 14.—The stock market was mixed and quiet on the opening today. The market, which opened at 10:30 a. m., saw a slight decline in the price of most stocks. The market, which opened at 10:30 a. m., saw a slight decline in the price of most stocks. The market, which opened at 10:30 a. m., saw a slight decline in the price of most stocks.

Newspaper Richmond Independent September 14, 1948

Richmond, Sept. 14.—The Richmond Independent newspaper, which was founded in 1932, is celebrating its 16th anniversary today. The newspaper, which is published daily except on Sundays and holidays, has a circulation of over 10,000 copies. The newspaper, which is published daily except on Sundays and holidays, has a circulation of over 10,000 copies.

Five Treated at Hospital Here in Strike Violence

Richmond, Sept. 14.—Five persons were treated at the Richmond Hospital today as a result of violence during the strike. The persons, who were injured during the strike, were taken to the hospital by ambulance. The persons, who were injured during the strike, were taken to the hospital by ambulance. The persons, who were injured during the strike, were taken to the hospital by ambulance.

Angry Strikers Tossed Anything

Richmond, Sept. 14.—A group of angry strikers today tossed anything in their path as they marched through the city. The strikers, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police. The strikers, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police.

CIO Orders Picketing To Continue

Richmond, Sept. 14.—The CIO has ordered the picketing to continue. The CIO, which is the United Brotherhood of Carpenters and Joiners of America, has ordered the picketing to continue until the strike is resolved. The CIO, which is the United Brotherhood of Carpenters and Joiners of America, has ordered the picketing to continue until the strike is resolved.

Scores Injured; Police Fire Tear Gas At Massed Pickets

Richmond, Sept. 14.—Scores of persons were injured today as police fired tear gas at massed pickets. The pickets, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police. The pickets, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police.

Valuation of Utilities Up

Richmond, Sept. 14.—The valuation of utilities has increased today. The valuation, which was determined by the state, has increased by 10 percent. The valuation, which was determined by the state, has increased by 10 percent.

Building Here Shows Gain

Richmond, Sept. 14.—The building industry here shows a gain today. The industry, which has been struggling for some time, is now showing signs of recovery. The industry, which has been struggling for some time, is now showing signs of recovery.

90 More Mexican Nationals Seized

Richmond, Sept. 14.—Ninety more Mexican nationals were seized today. The nationals, who were caught by the police, were taken to the immigration station. The nationals, who were caught by the police, were taken to the immigration station.

Weather

Richmond, Sept. 14.—The weather is expected to be clear and sunny today. The temperature is expected to be in the 70s and 80s. The weather is expected to be clear and sunny today.

News

Richmond, Sept. 14.—The news is expected to be interesting today. The news, which will be reported by the news agencies, is expected to be interesting. The news, which will be reported by the news agencies, is expected to be interesting.

Local News

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World News

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Sports

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Change in Wind Saves Ojai As Thousands Flee

Ojai, Sept. 14.—A calm drizzle in the morning, but a strong wind in the afternoon, saved the Ojai fire from becoming a disaster. The fire, which started in the morning, was quickly extinguished by the fire department. The wind, which was blowing from the north, kept the fire from spreading to the south. The fire department, which was called in at 10:30 a. m., arrived at the scene at 11:30 a. m. and quickly put out the fire. The fire, which was about 100 feet long and 50 feet wide, was caused by a lightning strike.

Supervisors Delay Bond Issue Move

Richmond, Sept. 14.—The Richmond Board of Supervisors today delayed a move to issue bonds for the construction of a new city hall. The board, which met in a special session today, decided to postpone the issue of bonds until next month. The board, which is composed of five members, is currently considering the issue of bonds for the construction of a new city hall.

Water Uncertainty May Shrink Land Values in Valley

Richmond, Sept. 14.—The uncertainty over the future of the water rights in the Richmond Valley may lead to a sharp decline in land values. The water rights, which are owned by the state, are currently being contested by the local landowners. The water rights, which are owned by the state, are currently being contested by the local landowners.

Dr. Degnan Named Medical Director of Contra Costa

Richmond, Sept. 14.—Dr. J. H. Degnan, a prominent physician in the Richmond area, has been named medical director of the Contra Costa County Health Department. Dr. Degnan, who has been practicing medicine in the Richmond area for many years, was named to the position by the board of health. Dr. Degnan, who has been practicing medicine in the Richmond area for many years, was named to the position by the board of health.

Stocks Mixed And Quiet On Opening

Richmond, Sept. 14.—The stock market was mixed and quiet on the opening today. The market, which opened at 10:30 a. m., saw a slight decline in the price of most stocks. The market, which opened at 10:30 a. m., saw a slight decline in the price of most stocks.

Newspaper Richmond Independent September 14, 1948

Richmond, Sept. 14.—The Richmond Independent newspaper, which was founded in 1932, is celebrating its 16th anniversary today. The newspaper, which is published daily except on Sundays and holidays, has a circulation of over 10,000 copies. The newspaper, which is published daily except on Sundays and holidays, has a circulation of over 10,000 copies.

Five Treated at Hospital Here in Strike Violence

Richmond, Sept. 14.—Five persons were treated at the Richmond Hospital today as a result of violence during the strike. The persons, who were injured during the strike, were taken to the hospital by ambulance. The persons, who were injured during the strike, were taken to the hospital by ambulance.

Angry Strikers Tossed Anything

Richmond, Sept. 14.—A group of angry strikers today tossed anything in their path as they marched through the city. The strikers, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police. The strikers, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police.

CIO Orders Picketing To Continue

Richmond, Sept. 14.—The CIO has ordered the picketing to continue. The CIO, which is the United Brotherhood of Carpenters and Joiners of America, has ordered the picketing to continue until the strike is resolved. The CIO, which is the United Brotherhood of Carpenters and Joiners of America, has ordered the picketing to continue until the strike is resolved.

Scores Injured; Police Fire Tear Gas At Massed Pickets

Richmond, Sept. 14.—Scores of persons were injured today as police fired tear gas at massed pickets. The pickets, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police. The pickets, who were protesting against the strike, were seen throwing rocks, bottles, and other objects at the police.

Valuation of Utilities Up

Richmond, Sept. 14.—The valuation of utilities has increased today. The valuation, which was determined by the state, has increased by 10 percent. The valuation, which was determined by the state, has increased by 10 percent.

Building Here Shows Gain

Richmond, Sept. 14.—The building industry here shows a gain today. The industry, which has been struggling for some time, is now showing signs of recovery. The industry, which has been struggling for some time, is now showing signs of recovery.

90 More Mexican Nationals Seized

Richmond, Sept. 14.—Ninety more Mexican nationals were seized today. The nationals, who were caught by the police, were taken to the immigration station. The nationals, who were caught by the police, were taken to the immigration station.

Weather

Richmond, Sept. 14.—The weather is expected to be clear and sunny today. The temperature is expected to be in the 70s and 80s. The weather is expected to be clear and sunny today.

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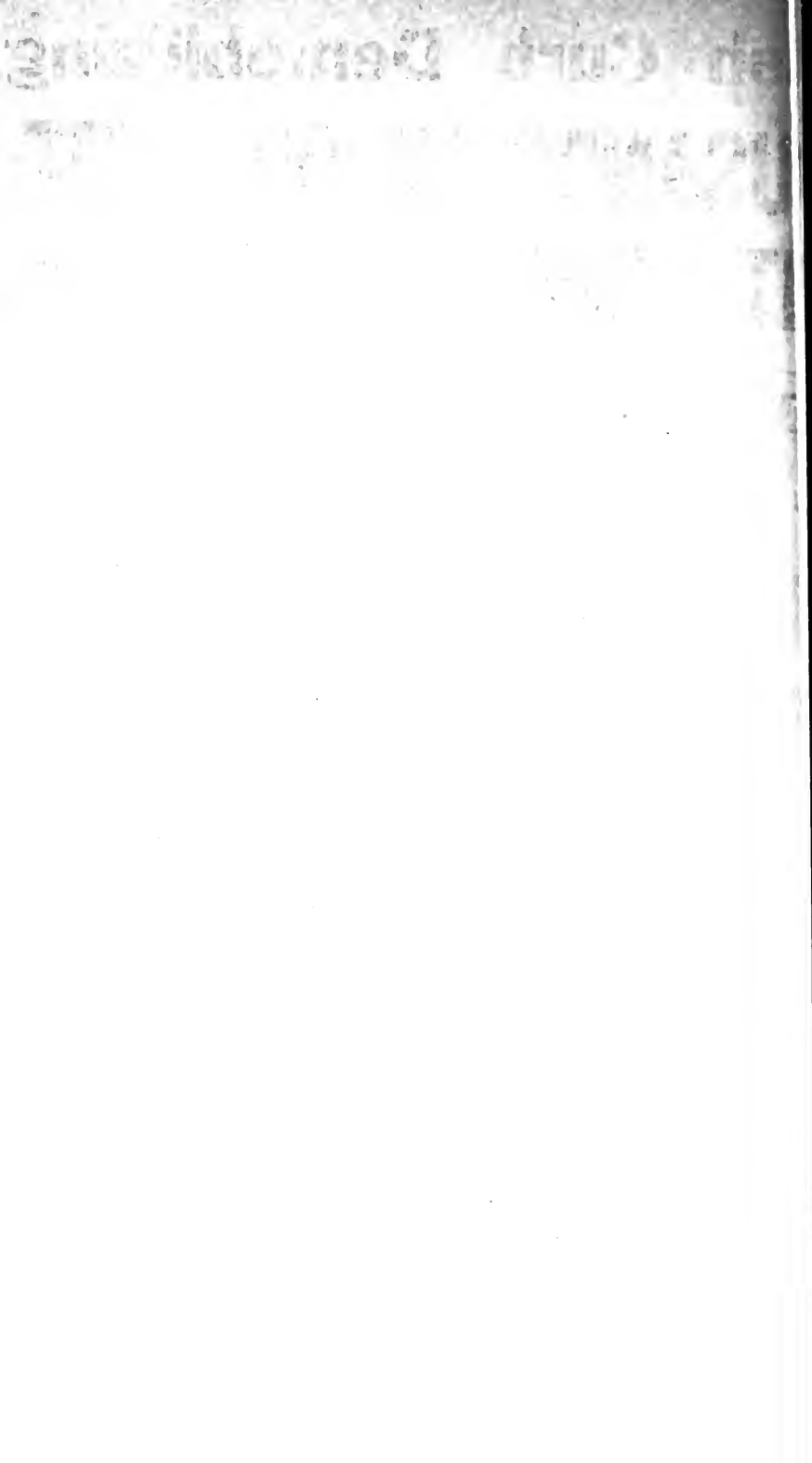
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RICHMOND DAILY INDEPENDENT

OVER 100,000

READERS DAILY

Richmond, California, Friday, Sept. 17, 1948

Weather

The Forecaster has begun a series of reports which show the weather for the next few days. The weather is expected to be clear and sunny with a high of 75 and a low of 55.

No. 44

Standards Smear, Tar 4 Homes Here

City Seeking Aid In Settlement of Standard Strike

Inter-union friction in the strike at Standard Oil Company here threatened to flare into new violence today after plans reported that four and a half miles had been covered over four Richmond homes.

The lawsuit a charge from L. P. Howe, international representative of the Machinists, that the Oil Workers Union had violated their agreement and "unless it is stopped we will be forced to take preliminary measures."

Other developments in the continuing strike at the refinery here were:

1—City Manager Wayne Thompson of Richmond has offered the full services of the city in seeking a settlement of the strike and will confer today with two commissioners of the National Association of Machinists.

2—The International Association of Machinists, in paid advertising, charged that the Oil Workers Union did not give its members an opportunity to vote on the latest offer of Standard Oil. That was 12 1/2 cents an hour for 41 1/2 day increase.

3—Oil raisers' coordinators asked Pacific Coast motorists to adopt wartime driving restrictions to reduce consumption of gasoline and to be 10 percent.

4—Negotiations between Standard and Local 644 of the Oil Workers were scheduled to resume again today.

5—The city reported that the city of companies have been re-

opened.

6—The homes of Henrietta B.

7—The homes of Henrietta B.

8—The homes of Henrietta B.

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35—The homes of Henrietta B.

More Rate To Fall Today

The first of the series of rate cuts in the city of Richmond is expected to be announced today.

The previous rate cuts have been announced in the city of Richmond.

The rate cuts are expected to be announced in the city of Richmond.

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er Richmond Independent
er 17, 1948

Stocks in Decline As Selling Climbs

The stock market in Richmond is expected to be in a decline today as selling climbs.

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THE UNIVERSITY OF CHICAGO

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Richmond, California, Saturday, Sept. 18, 1948

Oil Walkout Parley Fails

Vandals Amok Again; Citizens Threatened

The war of nerves between rival factions in the Richmond Standard Oil refinery strike continued unabated today.

A luncheon conference, threatening telephone calls, and slashed wires were added to the acts of vandalism which have followed in the wake of the strike.

Byron Richey, secretary of Local 881, CIO Oil Workers in Richmond, said that a "micro-union" conference with Standard Oil Management yesterday failed to produce an agreement.

10 Killed as Plane Ploughs Into Crowd

Montreal, Sept. 18, 1948—Ten persons were killed and 13 seriously injured today when a Canadian Air Lines plane crashed into a crowd on the main street of Montreal.

The plane, a twin-engine Lockheed Constellation, was carrying a large party of the Canadian Air Lines staff and their families when it crashed into a crowd of about 100 people.

The crash occurred at about 10:30 a.m. as the plane was taking off from the airport.

The plane was carrying 20 passengers and 10 crew members. Ten of the passengers were killed and 13 were injured.

The cause of the crash is still under investigation.

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A luncheon conference, threatening telephone calls, and slashed wires were added to the acts of vandalism which have followed in the wake of the strike.

Byron Richey, secretary of Local 881, CIO Oil Workers in Richmond, said that a "micro-union" conference with Standard Oil Management yesterday failed to produce an agreement.

The report of vandalism today included the smashing of a typewriter and the destruction of the home of Curtis Childs, 490 Pleasant street, at 10:15 p.m.

Three employees of the Richmond Standard Oil refinery, who were on duty at the time, reported seeing the typewriter being smashed.

The report was made by Albert Smith, 1144 North Third street, and James Van, 1144 North Third street.

A woman whose husband was on the job in the refinery was a victim of a car accident today.

The car was driven by a man who was on duty at the refinery.

The car was involved in a collision with a truck.

The driver of the car was injured.

Police did not have time to get to the scene of the crash.

The car was involved in a collision with a truck.

The driver of the car was injured.

The cause of the crash is still under investigation.

The police have not yet received any information about the crash.

The car was involved in a collision with a truck.

The driver of the car was injured.

The cause of the crash is still under investigation.

Canyon Road Closed Today

The Canyon Road, which connects the city of Richmond with the city of Berkeley, was closed today.

Two Richmondites Killed On Highway

The Pacific Highway, which connects the city of Richmond with the city of Berkeley, was closed today.

Richmond Independent
Sept. 18, 1948

3-Hour Strike

The Richmond Standard Oil refinery workers went on a three-hour strike today.

The strike was called by the CIO Oil Workers in Richmond.

The strike was called in support of the workers in the Richmond Standard Oil refinery.

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RICHMOND INDEPENDENT

NOV 10

Warrants for the arrest of 14 directors of Radio 624 Western Union, including a National City commission, have been issued (continued on the front of page 2) by Judge C. C. McCreary, A.S. at the U.S. District Court, New York.

[illegible]

The railroad says the purchase of our debt by Southern Pacific will not at all enable them to give access to the drunk and violent.

The complaint alleges that the company is not licensed to conduct an oil disposal and that its officers were with the major contributors of funds for the

It is claimed the strike committee obtained the release of the rubber company's maps from the company's own vaults to control the sale of them to the public.

Warranted for the arrest of
Harris, including a statement
signed out of the court of Jack
of suit.

In dispatching Highway Patrol units to guard vehicles using the highway tunnel route to ports for shipping or exportation, Customs Guards 2 might easily today re-

"Heavy truckloads will not be tolerated.
"Heavy concentrations of traffic on state highways or at
ports on persons using them will be prevented by the full
exercise of the ship's law enforcement machinery, and in
harmony with the responsibilities I have taken upon me as all this

"The suit we bring on at this time is protection of the rights of persons traveling along state highways, local law enforcement is the responsibility of local authority.

"In United States County the sheriff the district attorney and the chief of police are the local officials responsible for law enforcement.

"I appeal to all interests concerned to exercise calm judgment and to refrain from any act calculated to interfere with the peaceful growth of any citizen."

Violence On Local Front

It was parked near the back of the Plaza San Pablo and covered over by a group of

The car was reportedly traveling in the southbound lane of the bridge, and the driver was seen to be driving in the southbound lane of the bridge.

The word **was** was written on the top and passed examined over the tortoise.

The winners are: James H. Brown, Richmond city councilman; Frank R. Carter, secretary of the group; Walter V. Bell, Monte Belk; Stanley Chapman, B. J. Phillips, Jr., Curtis C. Pope, Edward W. Smith, E. I. Smart, Frank Allen and Ernest Smith.

The winners are joined by J. H. Morrison, chairman; Henry G. Criswell, Richard Good, J. C. Wampler and J. H. Morrison.



James LARRY
Resident in Markey

Vendors on the North
side were also ordered to
suspend operations at
midnight.

Another auto parked at Wayman and College streets, parked with its rear end in

The word was written on the car and passed around over the network.

which they wish showing results and other materials on the Union in comparative offensive while they were campaigning for that a railroad engine back on the tracks on regularly property last Tuesday.

Johnson at that time charged that ~~the~~ ~~company~~ had ~~grown~~ the railroad taxes and the unpaid owed by the company had run off the books after it lost the great gains The Union Oil off-

They were embarrassed to get the engine back onto the rails when they were captured by a mob of militiamen, according to the magazine, which accused the 11 men taken as the rock throwers.

The collect has been turned over to District James N. Long's 10- and the agent of the 11 our a vibrated in last year

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Policemen Hurt in Strike Riot



STRIKE ACTION—One of the many thousands of the riotous crowds of Standard Oil Company strikers, here this morning in their effort to be captured by the Richmond Independent newspaper. The group was captured by several other Richmond Independent reporters who had been assigned over the rioters in the city by Mayor Bullock.

In a fight with one of the policemen, Eugene B. Bullock is a Union Oil Company striker. He had served a sentence for a previous strike-related offense. He was arrested by a policeman who was also a Union Oil Company striker. He was arrested by a policeman who was also a Union Oil Company striker.

Officers Subdue, Arrest Sluggers At S.O. Refinery

After fierce hand-to-hand fighting had raged on the Standard Oil strike front for almost an hour this morning, a company spokesman indicated that no further meetings will be held with the union until the traveling is stopped.

We are willing to meet with the union at any time on the stage here, but we cannot even discuss anything with a union disturbance going on outside the meeting place, the spokesman said.

The Standard Oil strikers today were reinforced by striking employees of the Union Oil Company of Idaho this morning and two of its men arrested on riot charges today were arrested last week in a strike-line dispute.

Five persons, eight of them policemen, required medical treatment for injuries received in the wild free-for-all that raged for 45 minutes at the entrance to the Gate 14 parking lot on Standard Avenue.

More than a score of officers, including both police and strikers, incurred cuts, bruises and bone cracking as the riot raged.

Now only eight of these policemen were injured in this morning's bitter rioting at the approach to Standard Oil's Gate 14 parking lot. They were:

Inspector Eddie Logan, broken arm, taken to Permanente hospital, Oakland.

Manuel Bullock, 34, 161 Buys Vista, Bakers, a striker treated at Permanente Medical Center for a head laceration.

Patrolman Eugene Burton, broken ribs, wound of right thumb, returned to work tomorrow.

Patrolman John Reis, sprained left thumb.

Sgt. Charles Hahn, head injured.

Patrolman Fay Hawkins, punctured horns of the body.

Patrolman Earl Bigham, ear band.

Patrolman George Nelson, ear left ear.

Inspector E. E. Galt, cut head.

But Inspector Bullock, who was injured on duty to his right hand yesterday, had the injury aggravated during this morning's fighting.

In addition, more than a score of others including both police and strikers, incurred cuts and bruises, and damaged clothing.

The rioting with teeth, clubs, rocks, and fists and a lot of shouting tactics.

A meeting between representatives of Standard and the striking U. O. I. Workers closed yesterday afternoon without any agreement being reached. The strike will be five weeks and at midnight Friday.

Late evening office and administrative workers were alerted by the police. Windows were broken from many of them and several drivers were slugged. One car was overturned at another parking lot. Three police cars were damaged by rocks.

These arrests were charged with riot, a high misdemeanor which carries a maximum of 10 years in the county jail and a \$2,000 fine. Those jailed were the following:

Manuel Bullock, 34, 161 Buys Vista, Bakers, identified as a striking Union Oil Company employee. He was arrested last week following a disturbance at the Union Oil plant at Olin.

Bullock, according to police, was seen to have thrown 10 bricks, some which entered the parking lot. Officer George Nelson, assigned to the riot area, said that Bullock created the riot by shouting "Go home, you bastards!"

Before he was arrested for shouting, Officer Sgt. Charles Hahn was seen to have hit Sgt. Earl Logan in the face, breaking his nose. Another policeman, Ray Hamilton, in the rioting, said he was injured by a rock. He was hit on the head with a right arm which was caught by a steel bar, and he was injured at Permanente Medical Center for a head laceration.

Manuel Bullock, 34, 161 Buys Vista, who was first on the rioting, was arrested today. He was charged that today he was the first on the rioting, was arrested today. He was charged that today he was the first on the rioting, was arrested today.

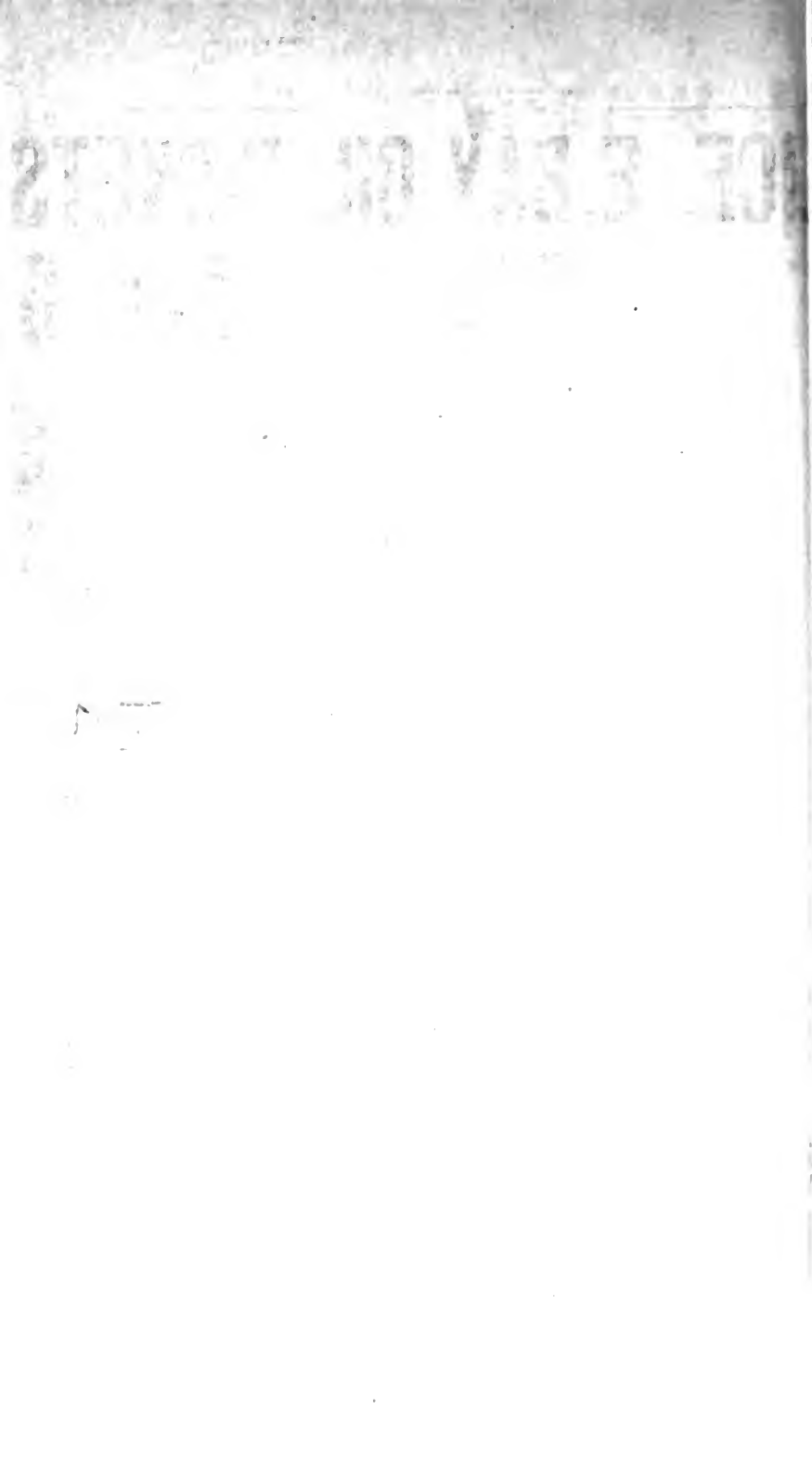
George Richardson, 32, of 228 Curry Street, Police said he was arrested on the rioting, was hit by the rioting, was arrested today. He was charged that today he was the first on the rioting, was arrested today.

James Wain, 26, of 1010, he was arrested on the rioting, was hit by the rioting, was arrested today. He was charged that today he was the first on the rioting, was arrested today.

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IL WORKERS BEATEN NEW STRIKE OUTBURST

Pickets Batter Workers With Baseball Bats

Scheduled to go on strike today, the 10,000 members of the International Union of Marine and Shipbuilding Workers of America (IUMSWA) were met by a group of about 100 pickets who used baseball bats to drive them back to work.

The pickets, who were armed with bats, met the strikers at the IUMSWA headquarters at the waterfront and drove them back to work. The pickets, who were armed with bats, met the strikers at the IUMSWA headquarters at the waterfront and drove them back to work.

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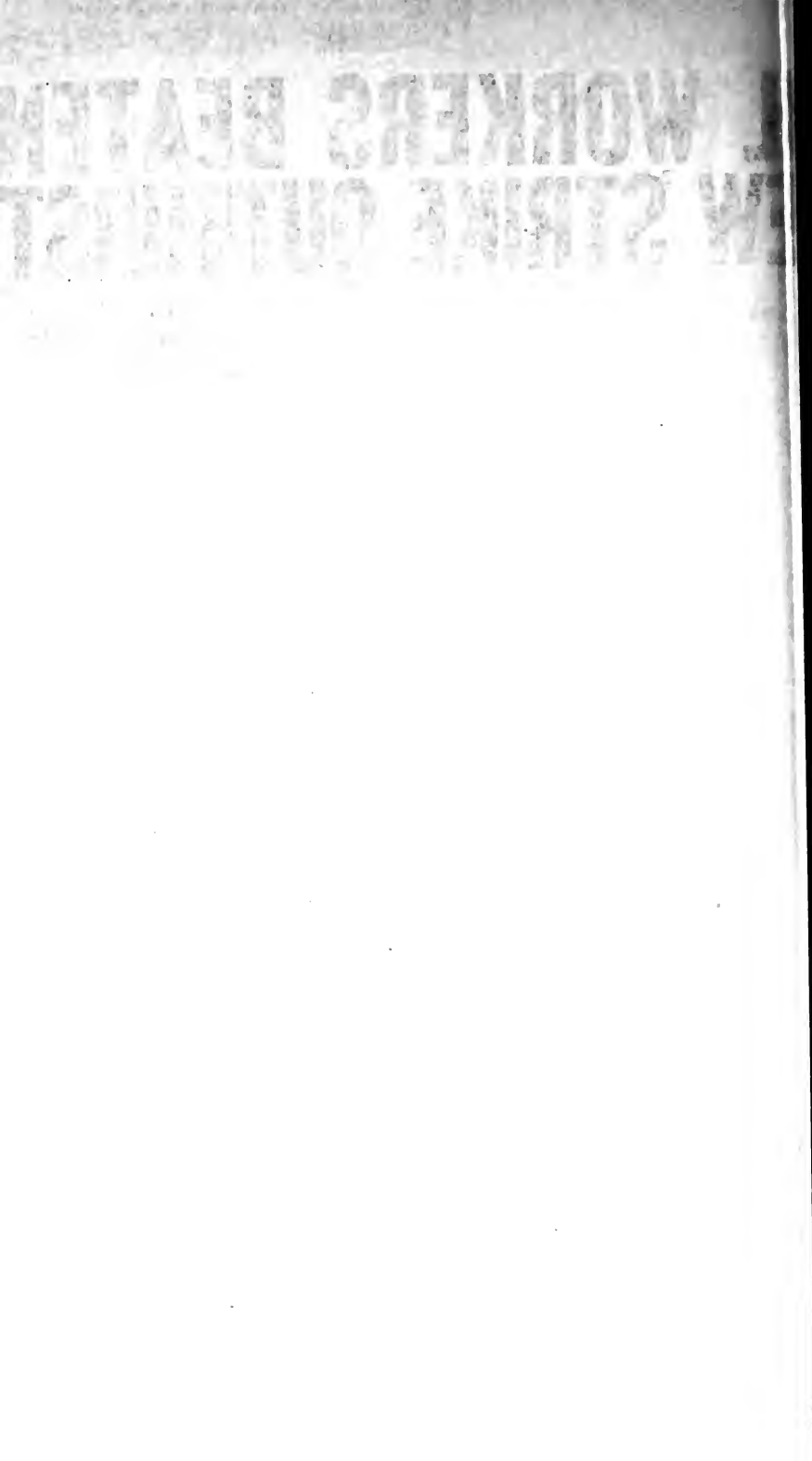
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OIL BATTLE IN NEW DOCKMEN JOIN IN ROCK FIGHT

400 Battle in New Oil Clash

Continued from Page 1

REVENUE OF OILMEN

Both sides in the continuing struggle were engaged in a series of exchanges of views on settling the dispute.

The struggle began at 1:45 a. m. when some 400 men, including Secretary of the Oil Workers' International Union, and the only dockmen present, met at the oil workers' union headquarters in Los Angeles for the day.

The Tribune learned that the union was not the only one making effort and that only the union of oil workers around a common survey was holding up an official settlement.

BARAGE QUESTION

Asked a harbor committee member why that the union was "holding down" the company, he replied that the union was not holding down the company but that it was holding out for the settling of all claims.

He suggested three methods of settling the problem, through a private arbitrator, through a public arbitrator, or through a public arbitrator.

He suggested that the public arbitrator be selected by the public arbitrator, through a public arbitrator, or through a public arbitrator.

He suggested that the public arbitrator be selected by the public arbitrator, through a public arbitrator, or through a public arbitrator.

Union Oil Company officials, and industry spokesmen.

"We have no quarrel with the union," said one of the industry spokesmen. "We have no quarrel with the union."

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DOCKMEN JOIN IN ROCK FIGHT

Four hundred strikers were gathered in a general strike outside the Harbor District today.

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Violence Continue as Oil Peace Looms

Violence Flares In Midnight Row At Standard Here

The familiar pattern of violence was repeated on the Richmond Standard Oil strike front last night even though law enforcers assume that night would be a calm one in the struggle between striking CIO Oil Workers and the Wall's major interests as scheduled for today.

A meeting between Standard Oil officials and the union was scheduled for 2 p. m. today in the administration building.

Riots Continue On Oil Front as Settlement Nears

(Continued from Page 1)

Marching on the right angle with a bull horn.

Some of the men were seen to be shouting about a quarter of 10 p. m. and a few feet from the independent newspaper building to a few feet from the right angle, reached against the curb on the opposite side of the street.

The demonstration of property and industry was not a CIO strike was to effect this morning about 100 CIO strikers and other sympathizers near Grant and 10, long before the demonstration of CIO strikers.

Large numbers of strikers were seen to have gathered in front of the main gate at 3:30 p. m.

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A meeting of Shell Chemical Company and Oil Workers' representatives in Richmond was scheduled for today but was postponed at the company's request. No date for the meeting was announced.

More than 100 members of the International Association of Machinists, Lodge 638 and International Association of Petroleum Workers, Local 111 held a strike meeting last night inside the Standard Oil building.

A spokesman for the two unions declared today that in view of the CIO-CIO action of striking in the Standard Oil building and the presence of officials of the Standard Oil company in the building, they were not going to attend the meeting.

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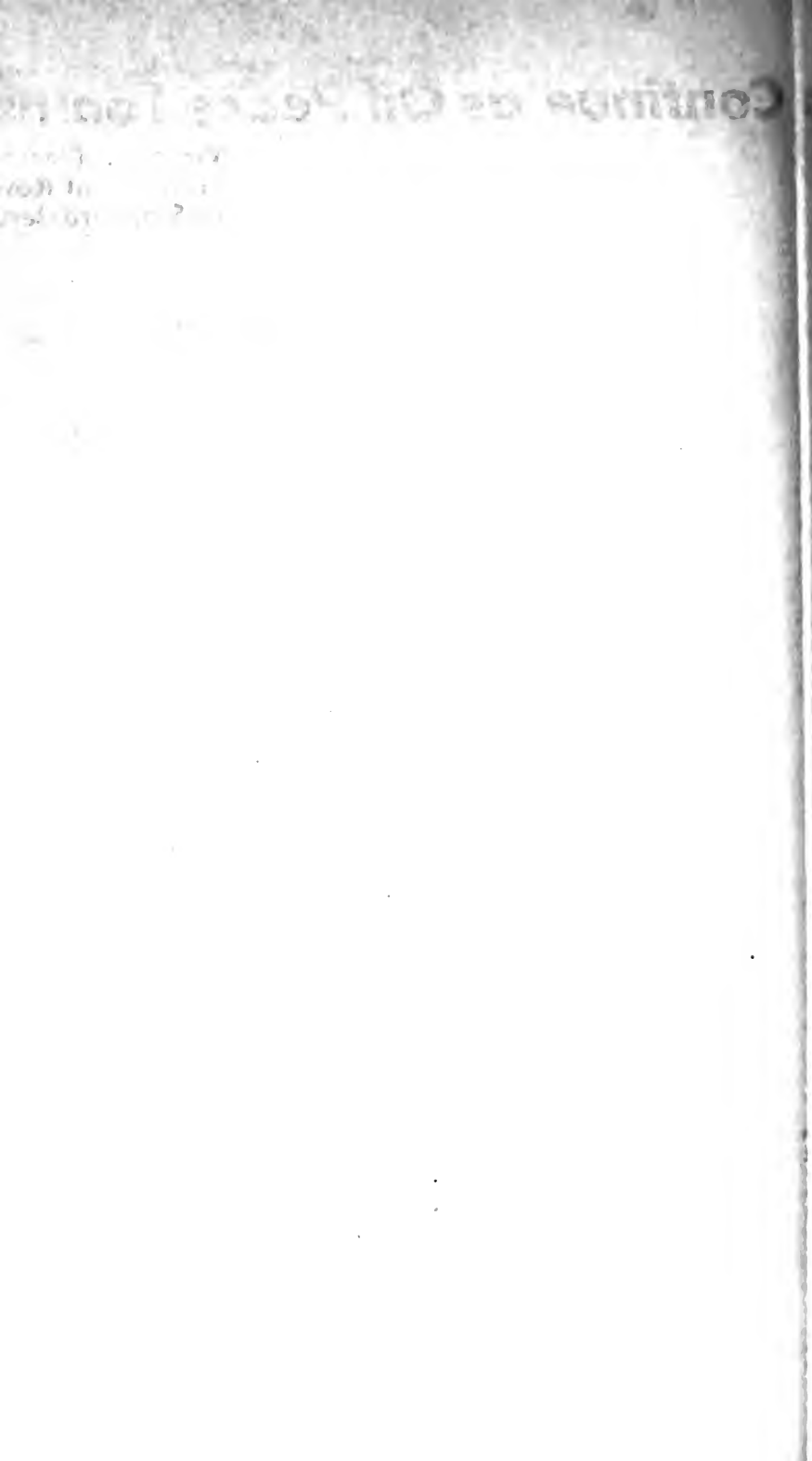
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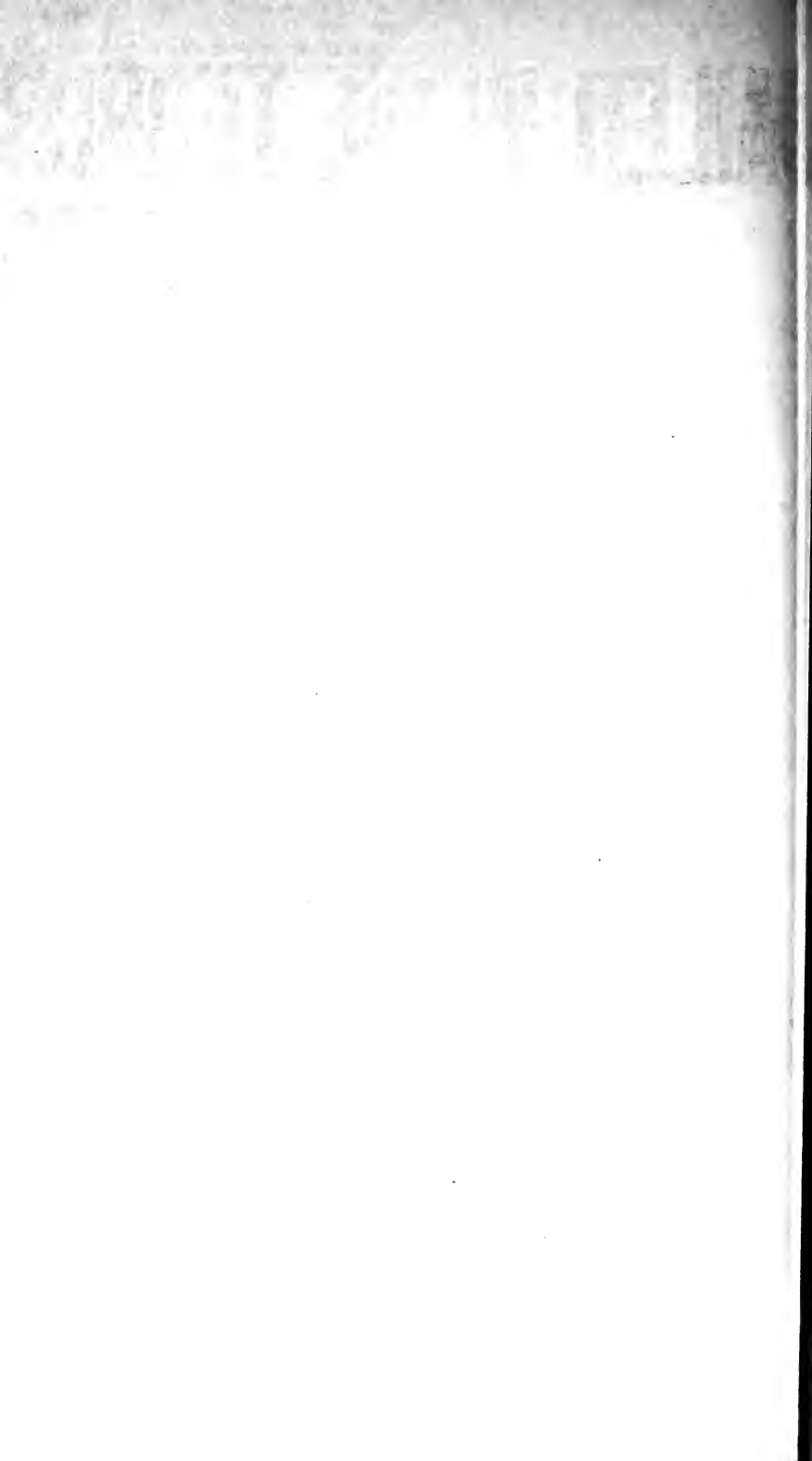


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Beating of Seaman Roils Union Head

and parking in urban areas limited

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He stressed that all six participants—two from the United States, one from Canada, one from Mexico, one from the European Community and one from the United Nations—were to be invited to attend the summit. The summit was to be held in the United States, and the United States was to be the host.

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Dr. J. G. Miller, 1001 Green Ridge
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The meeting held at the United Nations Secretariat Building in New York City on May 10, 1967, was attended by representatives of the United States, the Soviet Union, the United Kingdom, France, and the United Nations. The meeting was chaired by the Secretary-General, U Thant.

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Buty Semmberg was built here of the AFL Building Co., and was built in 1904. It was the first building to be built in the city. It was built on the site of the old city hall, which was destroyed by fire in 1891. The building was built on the site of the old city hall, which was destroyed by fire in 1891. The building was built on the site of the old city hall, which was destroyed by fire in 1891.

4.5 of these papers were submitted to the two referees, and to

The rugged leader of the grateful 421, perhaps more and less encouraging, would rebuke it blazes for the attack on Germany and its kind.

He said that even though Reagan was not a member of the union, it would take some time to get the money to a labor union group to be an OFI member.

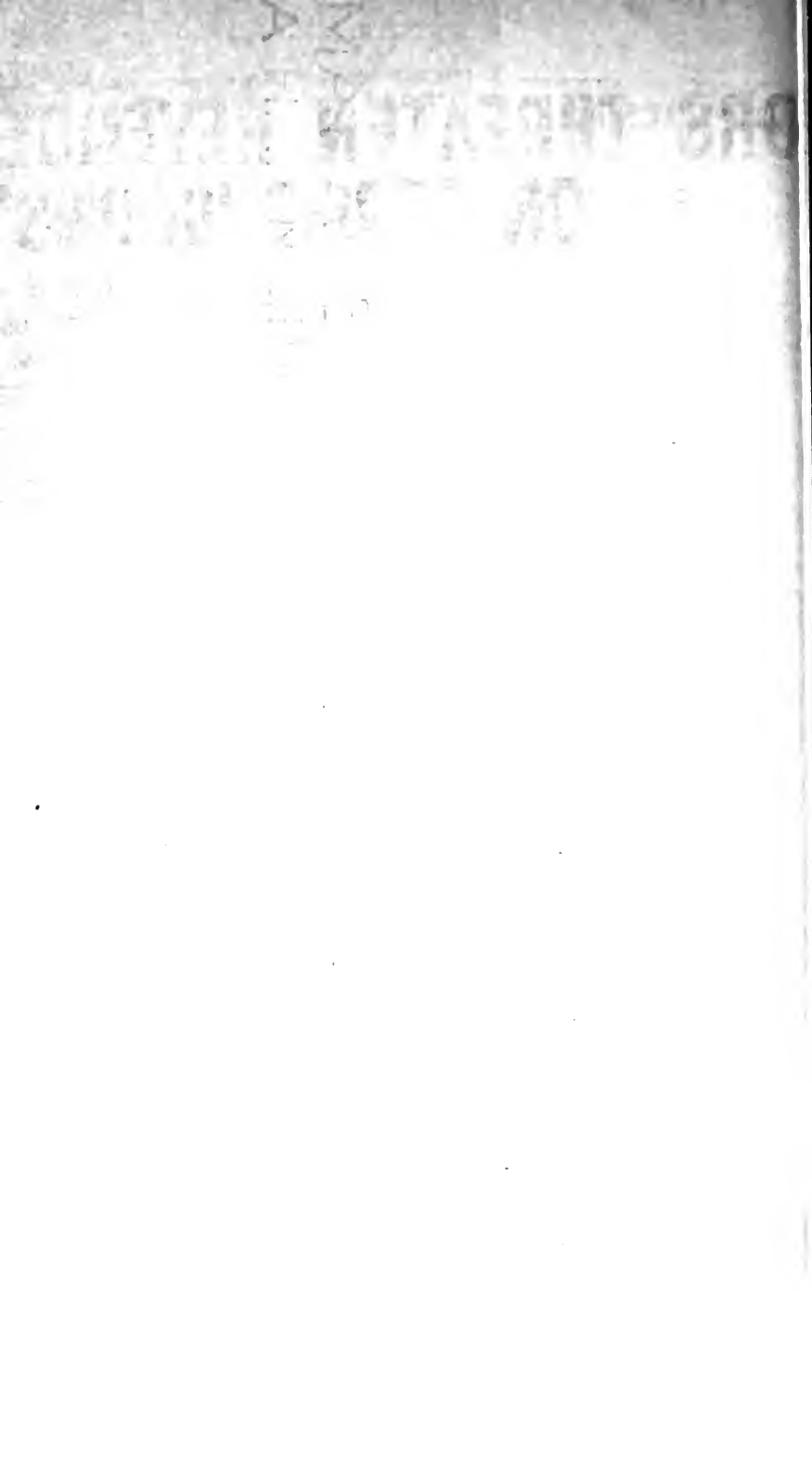
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Confederate States troops strike against some guerrilla bands following the week-end railroad strike, in addition to the guerrillas on Burnside, reported attacks on at least a dozen bands of anti-fighting guerrillas and burning of property of Unionists in this.

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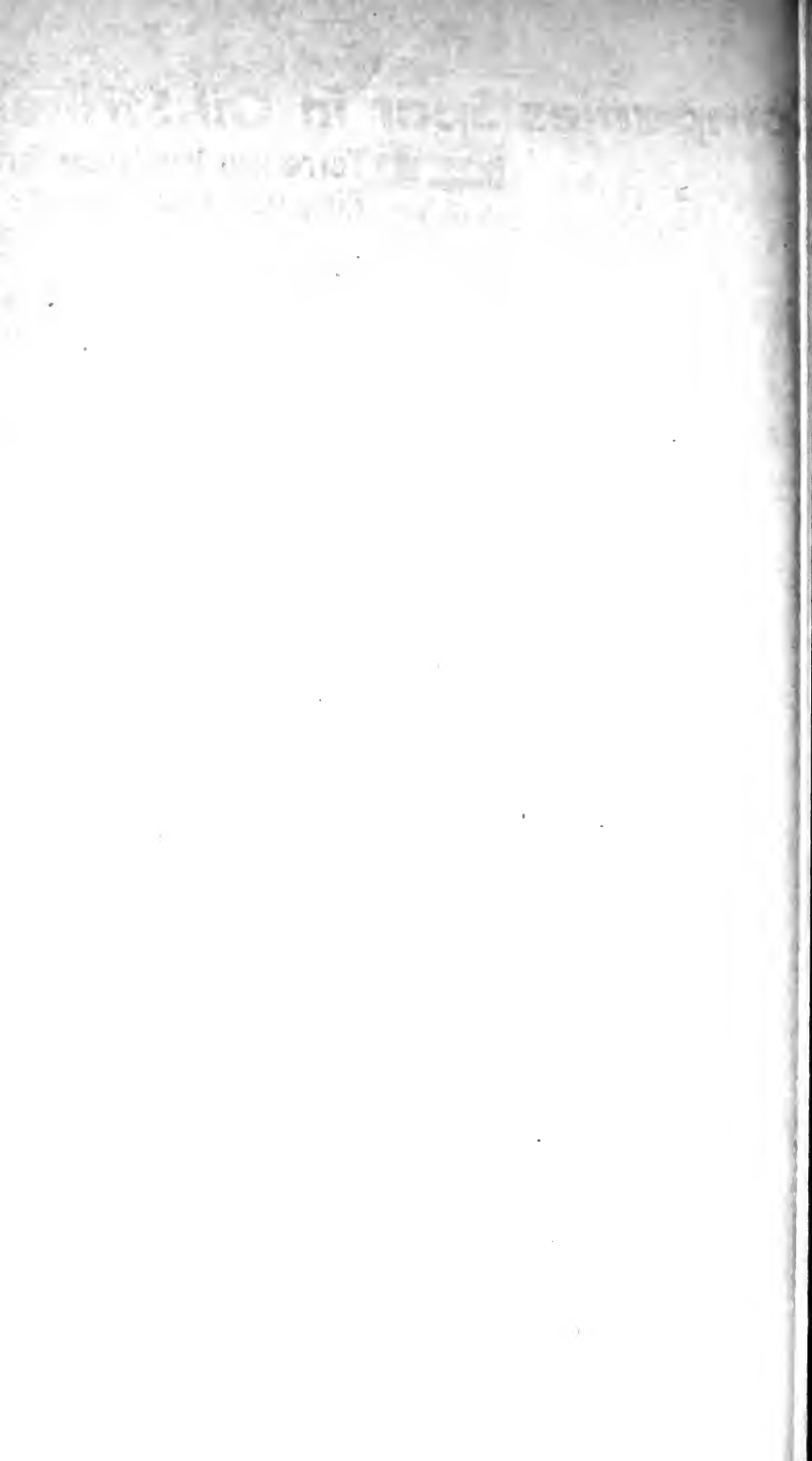
The daily newspaper reported yesterday on an Alamo County where three barrels of dynamite and three live-end fuses were discovered in the Western Pacific pool at Alamo in recent violence between the parties trying to dispossess the living of non-white between them and themselves.

(Continued Page 11, Col. 1)



Terrorism, Vandalism On Richmond Front Subside

Terrorism and vandalism, which broke out over the weekend and resulted in the arrest of 24 detainees, six of whom were slapped with felony warrants, subsided to whisper and there was an air of expectant calm in the vicinity of the struck plane.



The newspapers shown in Respondent's Exhibit No. 92 were circulated generally in the community in which the Company's refinery is located (R. 4370-4371). The exhibit was offered not as proof of the facts therein reported but to show the effect on the community, the workers in the refinery and their families of the unlawful acts established by evidence already in the record (R. 4371). Upon identification of the papers constituting the exhibit and the offer in evidence, the following objection was made (R. 4371):

"Trial Examiner Myers: Any objection to that exhibit going in evidence?

Mr. Law: Yes, indeed.

Trial Examiner Myers: I will sustain the objection."

We submit that the ruling was clearly erroneous.

In spite of the Board's refusal to admit such background evidence, the record sufficiently shows the general lawlessness which preceded these discharges to destroy any possible basis for assuming the discharges were for lawful activities.

In many of the incidents here there was no showing of any activities which the complainants would concede were strike activities having any connection with the discharges. Under the "Third" point of our argument we review the particular incidents with which the various complainants were connected. For example, the Company discharged nine of the complainants as the result of a predawn assault on workers attempting to come to work over a back road,²⁴ and discharged another group because

²⁴See "Yacht Harbor assault on October 12th," *infra* p. 74.

of an ambush after midnight.²⁵ All of the complainants involved testified. In each case they, as well as the General Counsel, realized that they could make no claim that these gatherings under cover of dark at these remote places constituted any phase of lawful protected activity. It was obvious that the circumstances were such that no lawful strike activity was conceivable.

In these instances, as with other incidents in the record, there is no evidence of any kind that any complainant was discharged for other than his evident connection with the assault, or ambush, as the case may be. There is no evidence of any kind that the Company was concerned in any way in reaching its decision to discharge with whether the assailants were strikers, nonstrikers, or mere hoodlums using the strike atmosphere as cover for vicious sky-larking, which in fact the circumstances seemed to indicate. This does not constitute a showing that the Company discharged the strikers for lawful strike activities. Only by accepting the Company's evidence that the purpose of the predawn rendezvous, the ambush, and the midnight patrols was to intimidate and assault employees going to work, can there be any findings that those complainants were discharged for acts connected with the strike. Whether the discharge of the complainants for their part, whatever it was, in the assault and the ambush was just or unjust, fair or unfair, there is no showing on which to base a finding that the Company discharged anyone for lawful strike activity.

²⁵See "Ambush on Winehaven Road on October 25th," *infra* p. 84.

We submit that the "showing" upon which the Board relies to shift the burden of proof is pure assumption. We further submit that under no theory can such an assumption satisfy the requirement of proof by "the preponderance of the testimony" or "substantial evidence on the record considered as a whole." Finally we submit that with any consideration at all of the voluminous evidence of violence and disorder the assumption becomes wholly untenable.

2. **THE BOARD ERRED IN HOLDING THAT THE MISCONDUCT OF ECONOMIC STRIKERS IS AN AFFIRMATIVE DEFENSE AND REINSTATEMENT DEPENDS ON WHETHER THE MISCONDUCT WAS "SUFFICIENTLY SERIOUS."**

In support of the Company's right of discharge we have pointed out that the strikers involved were economic strikers, and there is a complete lack of evidence of any hostility to the Union. The cases we have cited apply to this situation. The fundamental error of the Board has been in applying to this case principles of law applicable only to unfair labor practice strikers discharged in furtherance of the unfair labor practice and to admittedly discriminatory discharges where the employer seeks to avoid on special grounds the application of the normal remedy of reinstatement. In those situations reinstatement is predicated on a proved unfair labor practice.

The Board says in its decision (R. 224) "As we have noted, misconduct is an affirmative defense. Section 10(c) [of the Act] does not operate to overturn the well-established principle of law that the burden of establishing an affirmative defense is on the party alleging it."

What the Board is relying upon is a principle which is set out in its own Third Annual Report, published in 1939. At page 211 of the report it is stated:

"In several cases *involving discriminatory discharges, or strikes caused or prolonged by unfair labor practices*, the contention has been advanced that because of violent or unlawful conduct on the part of the employees involved the Board ought not to require their reinstatement * * *. In cases of serious offenses, it has withheld orders for the reinstatement of the guilty individuals. But where the misconduct is not grave * * * the Board has usually required reinstatement."

That principle does not apply to this case where the primary issue is whether or not the employer has committed an unfair labor practice.

(a) **The Board misconceives the issue to be decided.**

Primarily there are two questions submitted for decision in cases such as this: (1) Has the employer committed an unfair labor practice which entitles the employee to the remedy of reinstatement? and (2) Will the granting of the remedy effectuate the policies of the Act or has the employee so conducted himself as to forfeit his right to reinstatement?

This court as early as 1938 correctly stated the rule in *National Labor Relations Bd. v. Carlisle Lumber Co.* 99 F.2d 533, cert. den. 306 U.S. 646, when it said (p. 537):

"A condition of reinstatement is that the employer must have been guilty of an unfair labor practice. * * * Another condition is that the affirmative action must be such as will effectuate the policies of the act."

In this case the Board has passed over the first question with an assumption, and its findings deal solely with the second question.

The Board's misconception of the issue to be determined is revealed at the outset of the Intermediate Report. In the statement of the background of the controversy there is a finding that shortly before the discharges the Company told the Union that the Company "*would agree to immediately reinstate all the strikers who, in its opinion, had not engaged in any acts or conduct during the strike which would deprive them of their statutory right to reinstatement*" (R. 243, emphasis added). In the absence of an unfair labor practice there is no such statutory right.

There is no evidence that the Company's spokesman made the statement referred to. The purported finding is based upon the testimony of the Union secretary, that the Company's representatives told the Union that "they felt that there were certain things that had happened which, in their mind, made it necessary for them not to rehire certain people" (R. 469) and "that they would take practically everyone back to work except for those people who they felt had engaged in certain activities which they didn't consider were good for an employee of the Company to engage in" (R. 472).

According to the evidence the Company's spokesman told the Union that the Company expected to reinstate all strikers except a few who would be denied reinstatement, not because they belonged to the Union nor because they went out on strike, but because they did things the

Company felt no employee should do. This was the Company's right under the law. The Company did not tell the Union, and there is no evidence that the Company told the Union that it would reinstate all the strikers except those who had committed acts "which would deprive them of their statutory right of reinstatement." The Company had no such obligation under the law to the complainants as economic strikers and made no such agreement with the Union.

The distinction between the transcribed testimony and the Board's version of this incident is the key to the Board's treatment of the evidence in its findings. The Board has assumed that the strikers here involved have a statutory right of reinstatement unless deprived of that right by conduct which no longer fits them for employment. Unfair labor practice strikers may have such a right. *But these complainants were admittedly economic strikers.* As this court said in the *Carlisle* case: "A condition of reinstatement is that the employer must have been guilty of an unfair labor practice." The Board assumed that the Company was guilty at the outset of the case without reference to the facts proved.

This is not a case where the employer, admittedly having committed an unfair labor practice, seeks to defeat the employee's normal remedy of reinstatement. The question to be decided before any question regarding remedy could arise is whether the Board's General Counsel has proved by a preponderance of the evidence that the complainants were discharged not for misconduct but for lawful strike activity.

In support of the proposition that the misconduct of complainants in this case is an affirmative defense on which the Company has the burden of proof and that reinstatement depends upon the seriousness of the misconduct the Board relies on its 1944 opinion in the *Mid-Continent Petroleum Corporation* case (54 NLRB 912).²⁶ The Mid-Continent decision, although concerned with economic strikers, purports to follow *Labor Board v. Fansteel Corp.* (1939) 306 U.S. 240, dealing with unfair labor practice strikers. The Board later justified this by noting that the *Mid-Continent* decision was predicated on the fact that "the employer in effect conceded that certain strikers were being penalized for their strike activities."²⁷ There is no such concession in this case (R. 459-460).

²⁶R. 222.

²⁷*National Grinding Wheel Company, Inc.* (1948) 75 NLRB 905, 908.

The *Mid-Continent* case, according to the dissenting opinion in the *National Grinding Wheel Company* case, states a "decisional policy" underlying which "was the almost conclusive presumption predicated upon the accumulated experience of this Board" (R. 538).

With the express purpose of avoiding decisions based upon such "expert" inferences, Congress provided in section 10(c) of the Labor Management Relations Act of 1947 that the Board should base its decisions "upon the preponderance of the testimony." In the Conference Report on the Act (U.S.C. Cong. Serv., 80th Cong., 1st Sess., 1947), referring to section 10(c), it is stated (p. 1160):

"The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence. Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, *evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom*, where it would not meet that test otherwise" (emphasis added).

And (p. 1162):

"The language [of the Act] * * * precludes the substitution of expertness for evidence in making decisions."

Further, it should be noted that the so-called statement of principle in the *Mid-Continent* case was mere dictum, as there was no order of reinstatement and the complaint was dismissed.

- (b) The cases relied upon by the Board involve unfair labor practice strikers discharged in furtherance of the unfair labor practice.

Labor Board v. Fansteel Corp. (1939) 306 U.S. 240 is the leading case on the refusal to reinstate strikers even though they have been victims of an employer's unfair labor practice. In that case the Board had found that the employer had openly refused to bargain and had "engaged in a consistent program, developed along varied lines, of both open and underhanded attack upon the efforts of its employees to exercise their right to self-organization."²⁸ Upon this ground the Board ordered the employer to reinstate with back pay all strikers. The Supreme Court did not question the finding of unfair labor practice. It nevertheless set aside the Board's order of reinstatement because the strikers had engaged in unlawful conduct, i.e., a sit-down strike. In its opinion the Court said (p. 255):

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work."

²⁸5 NLRB 930, 939.

Where the employer's unfair labor practice has caused the strike as in the *Fansteel* case or where the employer's unlawful discrimination is conceded as in the *Mid-Continent* case the misconduct of the complainants may be a matter of affirmative defense. The defense is in the nature of confession and avoidance. That is not the situation here. There is no evidence that the employees here struck because of any unfair labor practice or fault of the Company.

The question of whether *unfair labor practice* strikers should be reinstated or whether the misconduct of such strikers was sufficiently serious to render the normal remedy of reinstatement inappropriate has been before the courts a number of times.

See:

National Labor Relations Bd. v. Stackpole Carbon Co. (3 Cir. 1939) 105 F.2d 167, where the Board had found that the employees had struck "as a direct result of the respondent's unfair labor practices" (p. 175).

Republic Steel Corporation v. National Labor R. Bd. (3 Cir. 1939) 107 F.2d 472, where the Court said (p. 478): "The causes of the strike remain the unfair labor practices * * *."

National Labor Relations Bd. v. Elkland Leather Co. (3 Cir. 1940) 114 F.2d 221, where the Court found that the strike was caused by the unfair labor practices of the Leather Company.

Southern S. S. Co. v. Labor Board (1942) 316 U.S. 31, where seamen who struck because of the employer's refusal to bargain were held properly discharged.

Of particular interest is *National Labor Rel. Board v. Clinchfield Coal Corp.* (4 Cir. 1944) 145 F.2d 66, which is cited by the Board (R. 223). In that case the Board had found "that the strike was caused by the unfair labor practices of the employer." The Court, without disturbing this finding, said (p. 73):

"But, even so the strikers were not justified in interfering with the Coal Company's possession of its own property and when they overstepped the bounds they furnished lawful grounds for their discharge."

In another part of the opinion (p. 72) the Court, in the *Clinchfield* case quotes the Board as saying:

"The Trial Examiner did not consider the evidence of the alleged misconduct of the discharged employees which was not reported to General Manager Adams or which allegedly occurred after their discharge, on the theory that such misconduct 'could have had no bearing upon the discharge.' In our opinion, however, such evidence is relevant in determining the remedy to be adopted. We have considered all of the testimony with regard to the alleged misconduct of these employees and find nothing in their behavior which would lead us *to vary or deny the normal remedy of reinstatement with back pay*" (emphasis added).

In that case the Board had in mind the distinction, which we urge here, between determining whether an unfair labor practice had been committed and whether the normal remedy should apply.

These are the cases upon which the Board and its attorneys rely (1) to justify placing the burden of proof on the Company, and (2) to justify a distinction between more and less serious misconduct in determining rein-

statement. They relate in each case to unfair labor practice strikers discharged in furtherance of the unfair labor practice or employees admittedly discriminated against unlawfully. Furthermore, they clearly make the distinction between the two problems of determining the lawfulness of the discharges and the appropriateness of the remedy of reinstatement.

- (c) In the absence of an unfair labor practice, reinstatement does not depend upon the "seriousness" of the employee's misconduct.

Applying the "more or less serious conduct" test derived from the above noted cases the Board here has segregated 43 from the group discharged and ordered their reinstatement, ignoring the fact that a "condition of reinstatement is that the employer must have been guilty of an unfair labor practice."²⁹

For example, in ordering reinstatement of the complainant Ottino, the Board says his conduct "was not of such a serious nature" (R. 217). Such reasoning as applied to economic strikers has been rejected repeatedly by the courts.

In *National Labor Relations Board v. Indiana Desk Co.* (7 Cir. 1945) 149 F.2d 987, the Court reviewed a decision of the Board (56 NLRB 76) in which it said regarding the discharged strikers (p. 79):

"* * * their conduct involved no serious acts of violence, and no arrests were made by the local police authorities. Such disorder, although not condoned by us, can normally be expected in any extensive

²⁹*National Labor Relations Bd. v. Carlisle Lumber Co.* (supra) 99 F.2d 533, 537.

strike, and is no warrant for a denial of reinstatement.”

The Court observed that the record was “silent as to any antiunion background.” That is true in this case. The Court then said (p. 995):

“Neither do we think, as the Board seems to imply, that the misconduct of the picketers should be measured by the amount of violence which occurred.

* * * * *

To hold that the striking employees in this case are entitled to be reinstated, some of them with back pay, is to put a premium upon their misconduct and to encourage like conduct on the part of others.”

Similar criticism of the Board’s view is found in *Wilson & Co. v. National Labor Relations Board* (7 Cir. 1941) 120 F.2d 913, where the Court said (p. 924):

“There runs through the Board’s argument the covert suggestion that the unlawful activities were of such minor character that the participants were not deprived of any rights under the Act. Respect for law and order demands the repudiation of such a suggestion. The effect of an unprovoked assault cannot be made dependent upon the size of the club with which it is committed.”

See also:

National Labor Rel. Bd. v. Reynolds Internat. Pen Co. (7 Cir. 1947) 162 F.2d 680;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566;

National Labor Rel. Bd. v. Wytheville Knitting Mills, Inc. (3 Cir. 1949) 175 F.2d 238;

Maryland Drydock Co. v. National Labor Rel. Bd.
(4 Cir. 1950) 183 F.2d 538.

In considering the propriety of discharges the question is not whether they were merited or unmerited or just or unjust, nor whether as disciplinary measures they were mild or drastic, since the question as to proper discipline is a matter for management discretion. The Board is limited, in a case such as this, to the question of whether or not the employees were discharged for lawful union activities.

National Labor Relations Bd. v. Montgomery Ward & Co. (8 Cir. 1946) 157 F.2d 486, 490;

National Labor Relations Board v. Mylan-Sparta Co. (6 Cir. 1948) 166 F.2d 485, 491.

Originally, in considering the discharge of economic strikers, the Board seems to have made an effort to apply the rule established by the courts. For example, in *Decatur Newspaper, Incorporated* (1939) 16 NLRB 489, the Board first found that the strike, like the strike here, "was not caused or prolonged by unfair labor practices of the respondent," and then said, "We also find that the respondent had reasonable grounds for believing that Severt and Lewis engaged in the assault. Under the circumstances of this case we hold that such refusal [to re-employ] did not constitute a violation of section 8 (1) or (3) of the Act."

In 1944, however, in *Mid-Continent Petroleum Corporation*, 54 NLRB 912, as we have seen, the Board misinterpreted the *Fansteel* case.

The Board next attempted to apply the affirmative defense principle to the discharge of economic strikers in *The Perfect Circle Company* (1946) 70 NLRB 526, quoting the dictum in the *Mid-Continent* case. In *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, the Court reversed the Board order of reinstatement. In that case four pickets stood in or near the path of the Company's manager as he attempted to enter the gate to the plant. When they would not step aside, he left. The Board held that although the circumstances may have given the manager reason to believe he was barred under threat of violence, this was not sufficient under the *Mid-Continent* principle. The Circuit Court disagreed strongly with the Board's view of the evidence but bowed to its findings under the limited power of review granted the courts prior to the 1947 amendments to the Act.³¹ It held, however, that regardless of the employees' intentions or motives "they barred the management out of the place" (p. 573) and this justified discharge.

In 1947, in Congress, the House Committee handling the bill which became the Labor Management Relations Act of 1947 severely criticized the Board's policy and reported:

"In cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts. It is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States Mail, obstructing

³¹See *Universal Camera Corp. v. NLRB* (Feb. 26, 1951) 95 L.Ed. 306.

railroad rights-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property and assault and battery.”³²

After the enactment of the Labor Management Relations Act of 1947 the Board again made a greater effort to follow the court decisions and on July 30, 1947, in *Underwood Machinery Company*, 74 NLRB 641, the Board, in effect, abandoned the principle of its *Mid-Continent Petroleum Co.* case and held at pp. 646-647:

“* * * in view of the finding that actually a union-sponsored slowdown did not take place, the issue posed is whether it is an unfair labor practice for an employer to discipline an employee in the mistaken belief that he has engaged in an unprotected type of concerted activity. We do not think that punishment visited in the ordinary course of operations because of the mistaken belief that the employee was engaged in unprotected activity can be said to have the purpose or effect of discouraging union membership or legitimate union activity. Because it may be unfair does not make it discriminatory.”

In *Augusta Chemical Co.* (1949) 83 NLRB 53, the Board considered the discharge of an employee who, during a strike, told a job applicant he better not go to work because, he said, “You might get hurt.” The Board held (p. 73):

“‘An employer may if it wishes, in applying plant discipline, impose restrictions on its employees’ conduct which, although of a relatively severe nature, are not violative of the Act unless they inter-

³²Legislative History of the Labor Management Relations Act, 1947, Vol. I, p. 318.

fere with the right to engage in concerted activities guaranteed by Section 7 of the Act or discriminate with respect to employment because of union activities. * * *

Management chose to regard this incident as intimidation of an employee which went beyond the bounds of normal free discussion among employees. *As this reason does not constitute, upon all the credible evidence, a pretext for discriminatory motive in effecting the discharge, Respondent's conduct, although somewhat heavy handed, cannot be held violative of the Act'*'' (emphasis added).

See also the Board decisions in the margin.³³

³³In *Atlanta Broadcasting Co.* (1948) 79 NLRB 626, in considering a charge of discriminatory discharge, the Board said (p. 627):

“ ‘As to Fenster, the Union concedes in its brief that he was at fault in failing to make the newscast. It contends, however, that Fenster's misconduct was not the real reason for his discharge. As to Lurie, it contends that there is no credible evidence to support a finding that he was guilty of any dereliction of duty. However, *the issue is not whether Fenster and Lurie were actually guilty of misconduct, but whether Speight believed that they were, and discharged them for that reason'* ” (emphasis added).

In re *Des Moines, Springfield and Southern Route* (1948) 78 NLRB 1215, the Board said (pp. 1218-1219):

“ * * * Purscell's discharge was not in violation of the Act. The record supports the conclusion that his discharge stemmed not from the Respondent's antipathy to his union activity in this instance, but from a desire to prevent disruptions in the orderly operation of its business. The precipitating cause, as far as Manager Arnold Fletcher was concerned, was the altercation with Burrhus. This is true even though we find, as did the Trial Examiner, that Burrhus was the aggressor. And, although this incident was provoked by the use of the word 'scab,' we are persuaded that it was regarded by Arnold Fletcher as a fortuitous circumstance of the case. *The record shows that he apparently in good faith concluded, although erroneously, after investigation, that Purscell struck the first blow'* ” (emphasis added).

These Board decisions correctly state the controlling principles of law as established by the courts.

In the fall of 1950, however, we find the Board, in this proceeding, reverting to its pre-1947 policy regarding the reinstatement of strikers, rejecting the clearly defined intent of Congress, and again refusing to follow the decisions of the courts.

When the issue is whether or not the employer has committed an unfair labor practice, as in this case, there is absolutely no authority in the law today for the proposition that misconduct is an affirmative defense on which the employer has the burden of proof and reinstatement depends upon whether the misconduct was "sufficiently serious." The law is otherwise. As a condition of reinstatement the Board must prove that the employer has been guilty of an unfair labor practice. The Board failed to prove that fact here, and its order of reinstatement must be set aside.

THIRD: EVEN ON THE ERRONEOUS THEORY THAT THE COMPANY HAD THE BURDEN OF PROVING THAT THE COMPLAINANTS WERE DISCHARGED FOR OTHER THAN LAWFUL STRIKE ACTIVITIES, THE PREPONDERANCE OF THE EVIDENCE CLEARLY ESTABLISHES THAT THE CONDUCT OF THE COMPLAINANTS WAS UNLAWFUL, IMPROPER, AND UNPROTECTED, AND THAT THE COMPANY WAS AMPLY WARRANTED IN DISCHARGING THEM FOR OTHER THAN LAWFUL STRIKE ACTIVITIES. EVEN ON THIS THEORY, THEREFORE, THE BOARD'S ORDER OF REINSTATEMENT IS ERRONEOUS AND MUST BE SET ASIDE.

Whether or not the Board proved or was relieved from proving the commission of an unfair labor practice, the

Company refuted any possible assumption of violation of the Act or inference of unlawful motive or purpose in discharging the complainants. The Company proved by a preponderance of the evidence that the cause of discharge in each case was other than lawful strike activity. We here review the evidence of the particular vandalism and unlawfulness which led to the discharges and the connection of the respective complainants with the occurrences. In themselves they constitute a remarkable pattern of lawlessness. We submit, however, that if the Company's judgment is to be evaluated the conduct of the individual complainants must be viewed in the atmosphere of continued violence in which it occurred and not in isolation as the Board viewed it.

1. **MASS DEMONSTRATIONS AT THE ADMINISTRATION PARKING LOT—COMPLAINANTS HERE INVOLVED: ANSCHUTZ, BORREANI, EMMANUELE, GILLESPIE, GROTHUES, HAMMON, HIGGINBOTHAM, HOLLIS, McLAUGHLIN, NELSON, OGDEN, PETERSON, POLSON AND WYATT.**

(a) The evidence on mass demonstrations.

For three successive days, October 4th, 5th and 6th, a mob gathered at the entrance and exit of the Administration or No. 14 Parking Lot at the refinery. A complete picture of the resulting disorder cannot be gained from oral testimony alone. In addition to the testimony of police officers and other impartial witnesses, the Company put in evidence numerous photographs and a moving picture film (Resp. Exh. 43). These pictures, as we have noted, were taken after the first day of disorder to secure evidence of violation of and enforcement of the state court restraining order. The film of which 463 feet (Resp. Exh. 43a) are devoted to scenes at the parking lot

on October 5th and 6th, gives probably the best over-all picture of what happened. In the violent mob action portrayed in these exhibits, it is rarely possible to follow the action of particular individuals except momentarily. In many cases, identification of complainants as members of the mob is all that was possible.³⁵

Events at the parking lot on October 4th.

On October 4th a crowd of strikers gathered at the parking lot because, according to the picket leader, it was reported that men were going through the lot to work in the refinery laboratory and "they wanted to stop them" (R. 3081). Seven of the complainants were identified by the Company as participants and each of them admitted being present. They were Emmanuele (R. 824), John Gayanich (R. 632), Hollis (R. 1917), Peterson (R. 1148), Rothacher (R. 923), Selle (R. 878), and Wyatt (R. 1052). Pickets tried to stop cars from going into the lot, but most of the cars eventually entered (R. 3084).

³⁵The Company introduced a number of photographs to establish the presence of particular individuals at the scene. As is common in mass picketing, the ebb and flow was between passive obstruction by stalling and the violent rushing and pushing of an assault (see Resp. Exh. 43). Not all of the still pictures, therefore, convey the threatening aspect of the milling crowd. Illustrative of his interpretation of such identification photographs is the trial examiner's comment regarding Respondent's Exhibit 9 that, "The picture depicts complainant Anschutz with his hands in his pockets leisurely walking across the entrance of the parking lot apparently to ascertain why a police officer was holding a man by the arms. * * * [and] reveals that he was doing nothing more than a reasonable person would do under like circumstances" (R. 260). Actually the picture shows an automobile waiting to enter the parking lot while the police attempt to clear the way by physically removing a group of the complainants standing, stalling and "leisurely walking" directly in front of the automobile. Appearing in the picture with Anschutz, and also "with his hands in his pockets," is the complainant Meindersee. Meindersee had a large rock in his pocket (R. 374).

Emmanuele testified that he and others stood in the entrance to the parking lot and were pushed out of the way by the police to let the cars enter (R. 824-827). Wyatt also admitted being one of the pickets at the entrance to the parking lot that morning (R. 1052). Selle said there was a gathering of from 50 to 75 people (R. 879). Peterson admitted walking around in the crowd (R. 1154).

The evidence shows that Alice Woods, an employee, on her way to work was prevented from driving into the lot by Gayanich and two other pickets who stood in the driveway (R. 2877, 2883). Gayanich carried a dark object in his hand (R. 2879) and told Miss Woods, "You are not coming in" (R. 2881). The other two pickets carried rocks in their hands (R. 2878). They were identified as complainants Hollis and Rothacher (R. 633, 638). After some minutes the employee abandoned her attempt to enter the parking lot and drove away (R. 2884). The complainant Hollis, who was identified by Gayanich as one of the pickets who, Miss Wood testified, was armed with rocks, admitted being in the picket line at the time (R. 1922).

On the same morning Gayanich and the others prevented another employee, Virginia Humphrey, from going to work, by blocking the sidewalk, calling her vile names, pushing her into the street and threatening her (R. 2852-2856).

The only property damage done on the morning of October 4th was the breaking of windows in two police cars (R. 3082-3083).

Events at the parking lot on October 5th.

On the next morning, October 5th, a larger group gathered at the parking lot (R. 3088). Women, as well as men, were in the picket line (R. 3089). The acting Chief of Police called from 35 to 40 police officers to the scene (R. 3090). He asked for the captain of the pickets, showed him a copy of the court's restraining order (Resp. Exh. 40), and instructed him not to block the entrances (R. 3087). The women, who for the most part were wives of the complainants, stood in front of the cars attempting to enter the parking lot, and the police officers had to pull them out of the way to prevent them from being run over (R. 3089). Men in the group fought with police officers (R. 3090). Car windows were broken (R. 3091, 1876), employees driving into the lot were assaulted (R. 3808-3810), and employees attempting to walk through the lot were attacked (R. 3539-3540). The crowd blocked cars trying to enter the lot, and jostled and pushed around the driveway (R. 3460). Several arrests were made (R. 3090-3091, 3502-3503).

The seven complainants who had been at the parking lot the previous morning admitted being in the group that gathered there again on October 5th. These were Emanuele (R. 823), John Gayanich (R. 645), Hollis (R. 1922), Peterson (R. 1155), Rothacher (R. 928), Selle (R. 877) and Wyatt (R. 1051). These seven and complainants Anschutz, Gillespie, Hammon, Higginbotham, McLaughlin, Meindersee, Nelson, Polson, W. L. Vetter and Vandegrift were identified by the Company in the group and charged with contempt of court in the injunction proceedings (Resp. Exh. 81, 83; R. 4362). Of this latter group, the fol-

lowing admitted being present: Anschutz (R. 1827-1828; Resp. Exh. 9), Hammon (R. 2508), Higginbotham (R. 1020-1021; Resp. Exh. 5), McLaughlin (R. 739), Meinderssee (R. 1188), Nelson (R. 2214), and W. L. Vetter (R. 1939). Buford Vetter (R. 1870-1874) and Leighty (R. 2766-2770) also admitted being in the crowd. Only Gillespie (R. 1491) and Polson (R. 1040) denied being present. Vandegrift did not testify.

Events at the parking lot on October 6th.

On the third morning, October 6th, there was a crowd of at least 150 men milling around and trying to block cars from entering the parking lot (R. 3095). One witness estimated that there were from 200 to 300 people in the crowd (R. 1567). There was a "big battle" that morning, according to one of the complainants (R. 1371). The pickets refused to clear the entrance and the police had to remove them by force (R. 3095). Car windows were smashed. Six arrests were made but the police were unable to stop the disorder (R. 3096-3097). Eight police officers were injured, one received a fracture of the nose, and another was hit on the head with a club (R. 3113). Employees going to work were struck in the face (R. 3802). As the crowd moved down the street, some of the men overturned a parked car (R. 3791, 4451).

Eight of the complainants who were in the crowd at the parking lot the previous morning admitted being there again this morning. These were John Gayanich (R. 651), Hammon (R. 2511-2512), McLaughlin (R. 742-744), Nelson (R. 2214), Rothacher (R. 942), Selle (R. 885), W. L. Vetter (R. 1962) and Wyatt (R. 1058). Of the complainants, seven others were identified that morning and ad-

mitted being present, Borreani (R. 1371-1372), Brackin (R. 1558), Grothues (R. 979), Harwayne (R. 2476), Martinez (R. 1093), Ogden (R. 2634) and Wyrick (R. 2167). Five of these, Borreani, Brackin, Grothues, Ogden and Wyrick, were charged with contempt of court in the injunction proceedings (Resp. Exh. 81, 83). Brock also admitted he was present (R. 2572).

Each of the complainants, except Vandegrift, who was not available, was called by the Company and examined regarding these events. Their testimony consisted largely of hesitant denials, loss of memory, equivocal identification, and reluctant admissions.

It is inconceivable that a crowd of this type should have gathered at the parking lot on these particular mornings by pure coincidence. Many of the complainants were there not just once but two and three times contrary to the terms of a court order prohibiting mass picketing (Resp. Exh. 40). The photographic evidence of mob violence and the proof of repeated assaults and of extensive property damage make incredible any contention that these crowds were in the main nothing more than the gathering of innocent spectators and bystanders. Yet the complainants uniformly testified that they did nothing and saw nothing, and their inability to identify themselves or their acquaintances in the photographs was in most cases extraordinary (R. 1961, 836-837, 956, 1833-1834).

The motion picture (Resp. Exh. 43) and the testimony of many of the police officers present establish beyond question the incredible character of the complainants' strangely uniform testimony that no one did anything, and no one saw anything, and no one recognized anyone else.

(b) The evidence amply justified discharge.

The Company position is that mass picketing and mass obstruction of its gates is unlawful and, whether or not it was union inspired or the result of a preconceived plan, it was not a concerted activity protected by the National Labor Relations Act, as amended.

Any contention that mass picketing is a "protected" activity, even under the Wagner Act, prior to its amendment by the Labor Management Relations Act of 1947, was dispelled by the Supreme Court in *Allen-Bradley Local v. Board* (1942) 315 U.S. 740. In upholding a Wisconsin statute under which mass picketing was held unlawful, the Court said (p. 750):

"And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal [Wagner] Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy."

Of the fourteen employees here involved, twelve were convicted of contempt for their participation in these very activities and fined by the state court before the rendition of the Board's decision. It was precisely because of conduct which the state court found unlawful that the complainants in question were discharged (R. 4410). The Board argues that "an employer, who discharges a striker on the ground that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly" (R. 223). We do not concede this to be the law, but if it is

we submit that when the employer is proved right by a court of competent jurisdiction, as it was in this case as to twelve of the fourteen complainants, an order of reinstatement is clearly erroneous. The view of the California Superior Court of Contra Costa County regarding these demonstrations is set out in its memorandum of decision (R. 147-153).³⁶

The Board ignores the over-all picture of mob action and mass picketing which impelled the Company to discharge the identified participants. On this part of the case the findings are limited to drawing fine distinctions based on the degree of individual participation in particular overt acts. This is done without reference to the setting in which the acts occur.

The Company pointed out to the Board that in its decision in *Socony Vacuum Oil Company, Inc.* (1948) 78 NLRB 1185, which involved a similar mass demonstration, it had held that the employer "was privileged to discharge or discipline any participant in such unlawful activity." To distinguish that holding the Board finds that "the strikers here did not gather at the gates pursuant to any plan to obstruct entry to or from the re-

³⁶See also: *In re Bell* (1942) 19 Cal.2d 488, 505:

"* * * Pickets may bring themselves to the notice of persons entering the picketed premises, but may not forcibly stop automobiles and intimidate the occupants by gathering in large numbers. Such action is more than peaceful persuasion. It is forceful intimidation and constitutes violence."

And:

Teller, Labor Disputes and Collective Bargaining, Vol. 1, p. 382, sec. 124:

"Excessiveness is everywhere held to affect the legality of otherwise lawful picketing. Picketing accompanied by violence, obstruction of the premises picketed (as in mass picketing) or false, insulting or misleading banners is accordingly held to be illegal everywhere."

finery, or any other illegal plan" (R. 220). We know of no statute or ruling which legalizes mass picketing or mass obstruction of an employer's gates merely because the participants gathered without a preconceived plan. There is no requirement that the Company establish premeditation or criminal intent. This contention by the Board was rejected by the Court of Appeals for the Seventh Circuit, in setting aside a Board order, in *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, 572-573. The Court held that intentions of strikers who bar entrance to their employer's premises are not determinative, because motives or good intentions cannot excuse such unlawful or improper conduct. Furthermore, as we have noted, the gathering of mobs in the entrance to this particular parking lot on three successive mornings could hardly have been a matter of chance.³⁷

The Board also states that "many of these strikers who are accused of being a member of a mob were merely observers who stood apart from those who gathered directly in front of Respondent's gates" (R. 221). If the reluctant testimony of the identified participants is taken at face value, every one of them, including the eleven whom the Board refused to order reinstated, were observers and innocent bystanders. Ogden, for example merely "wanted to go down and see what was going on" (R. 2644), but the police had to push him out of the driveway "more than

³⁷Regarding a similar situation the Court in *Goldfield Consolidated Mines Co. v. Goldfield Miners' Union* (C.C., D. Nev. 1908) 159 Fed. 500 said (p. 519):

"It is as unreasonable to suppose that these men assembled without design or concert among themselves, and without any direction or understanding with the union or its officers or committees, as it is to suppose that the wheels of a watch gear into place by accident."

once" to clear the way for cars attempting to enter (R. 2636). The record shows that the mob surged back and forth across the entrance to the parking lot (Resp. Exh. 43; R. 1567, 2481). As might be expected with milling crowds of this size, the shoving and crowding extended back away from the parking lot as much as fifty feet to the bus stop, referred to as the "little green shack" (R. 1091-1092, 1874; Resp. Exh. 31, 41).³⁸

It has been held by the Board and by the courts that proof of overt acts of violence is not necessary to establish that mass picketing is illegal. In the *Socony Vacuum* case (78 NLRB 1185) there was neither an actual assault nor property damage.

See also:

The International Nickel Company, Inc. (1948) 77 NLRB 286;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566, 573;

National Labor Relations Board v. Indiana Desk Co. (7 Cir. 1945) 149 F.2d 987, 995.

These decisions fully sustain the Company's right to discharge the participants in the mass demonstrations.

³⁸Some of the complainants admitted being pushed by and pushing the police as the police attempted to clear an entrance to the Company's property (Anschutz, R. 1831; Borreani, R. 1383; Emanuele, R. 826, 832; Hollis, R. 1923; McLaughlin, R. 744; Ogden, R. 2642). Others admitted moving around in the milling crowd (Harwayne, R. 2487; Martinez, R. 1092; Peterson, R. 1154; B. Vetter, R. 1874; Wyatt, R. 1057). Some admitted crossing or getting to the edge of the parking lot entrance (Brackin, R. 1567; Rothacher, R. 943; Selle, R. 880; W. L. Vetter, R. 1951). Others claimed they got no nearer than 8, 10, 15 or 20 feet from the center of rioting and the car smashing at the entrance to the parking lot (Grothues, R. 997; Higginbotham, R. 1024; Meindersee, R. 1190; Nelson, R. 2221; Wyrick, R. 2170). Only two, Gillespie and Polson, denied any participation (R. 1491, 1040).

The attempt by the Board to segregate the less violent from the more violent members of the mob in purported reliance upon the *Fansteel* case (supra, 306 U.S. 240) ignores the holding in that case that (pp. 260-261) "aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the 'sit-down' strikers themselves."

As we have noted, all but two were admitted participants. Only Gillespie and Polson dispute their identification. We submit, however, that under the Board's own decisions no matter how the issue of fact is resolved there is no basis for finding a discriminatory or unlawful discharge. (See cases discussed, supra pp. 47 and 49 to 50, *Decatur Newspaper Incorporated*, 16 NLRB 489; *Underwood Machinery Company*, 74 NLRB 641; *Atlanta Broadcasting Co.*, 79 NLRB 626; and *Des Moines, Springfield and Southern Route*, 78 NLRB 1215). The evidence is undisputed that these two, like the others, were discharged solely on the basis of their identification as participants in the clearly improper and unlawful mass disorder. There is no evidence of any kind that any other factor entered into the consideration of the Company in the case of a single individual. We submit this is determinative of the issue here as to all fourteen of the employees involved in this phase of the case.

2. PURSUIT OUT CASTRO STREET ON OCTOBER 4TH—COMPLAINANTS HERE INVOLVED: DAUSY AND FRANK GAYANICH.

(a) The evidence on the pursuit out Castro Street.

Employees Raleigh Andrews and Andrew Brascresco came to work at the picketed refinery by climbing the fence along Castro Street between midnight and one o'clock on October 4th. During the strike, it was not un-

common for employees attempting to go to work to be followed and molested (R. 4364).³⁹ Myles James, who drove Andrews and Brascresco in his Plymouth sedan to the prearranged spot near the refinery, testified that "everyone in the city was terrorized" (R. 4204). He further testified that when they arrived at the refinery fence Andrews and Brascresco got out of the car "and went over the fence into the refinery"; that Janet Taylor (now Mrs. Andrews) and Walter Hohstadt were also in the car; that after Andrews and Brascresco alighted he proceeded for about a quarter of a mile along Castro Street, when Hohstadt told him that "a picket's car took out after us" and it "was following us" (R. 4195). Hohstadt testified (R. 4219-4220):

"* * * we were more or less a little leery of whether the pickets would take out after us and if they caught us, well, we more or less had an idea of what would happen because, well, I watched one of their outbreaks of violence. I was up on a hill and watched them when the police had to resort to tear gas."

James further testified that he increased his speed; that he then noticed three other cars behind him; that he increased his speed again; that one car kept flashing a spotlight in his rear-view mirror making it difficult to drive; that a station wagon came up from behind on the right; that he tried to keep ahead of the station wagon; that the two cars collided and his car went into the ditch (R. 4196-4197). Mrs. Andrews and Hohstadt testified to substantially the same facts.

³⁹See Resp. Exh. 92 [rejected].

The station wagon was being driven that night by the complainant Dausy accompanied by complainant Frank Gayanich. Dausy denied he was chasing the James car and testified that he tried to pass that car and speeded up to go by on the left; and that he remembers nothing further until he woke up in the hospital (R. 1724-1728). Complainant Frank Gayanich's testimony was substantially the same.

Elbert O. Sherwood, an employee working in the refinery, testified that from inside the refinery fence that night he saw Andrews and Brascresco arrive in the Plymouth at the refinery and in fact that he was at this point inside the refinery by prearrangement to assist Andrews and Brascresco in getting over the fence. At that time Sherwood saw a station wagon, a black Buick and a third car take out after the Plymouth and, on Sherwood's urging, Andrews telephoned the police from inside the refinery "that those guys are chasing them" (R. 4090-4091).

Police Lieutenant Bacon testified that about this time he received a message over the police radio "that there was a car being chased north on Castro Street * * *" (R. 3609-3610, 3613), that in answer to this call he proceeded in a police car toward the north end of Castro Street, and that just before reaching Castro he saw a black Buick sedan traveling in the opposite direction at a high rate of speed (R. 3615-3616; General Counsel's Exh. 6). Officer Rodden, in another car, also heard on the police radio "a report of several autos following a green Plymouth sedan north toward North Richmond" (R. 4168) and he also proceeded toward the vicinity of Castro.

From this evidence, there can be no doubt that after leaving the vicinity of No. 1 Gate the Plymouth was chased or followed by several cars north on Castro Street, and that the testimony of James, Mrs. Andrews and Hohstadt regarding the events that transpired immediately prior to the accident is substantially in accord with the facts.

Lieutenant Bacon also testified that after the accident he interviewed the complainant Frank Gayanich at the hospital and asked him how the accident happened and that Gayanich replied that "he was chasing a car" (R. 3620). On cross-examination Officer Bacon testified that he could not "remember whether he said 'chasing' or 'following'" (R. 3644).

That the accident followed an unlawful chase seems hardly questionable in view of what happened immediately after the collision. After the Plymouth turned over beside the road, the occupants, in fear of pursuit, ran into an adjacent swamp area (R. 4197, 4209, 4216). Immediately a crowd of men got out of arriving cars and followed James, Mrs. Andrews and Hohstadt into the swamp screaming threats (R. 3622) and shouting, "Get the sons of bitches. Get them out of there, those scab strike breakers" (R. 4171), "Let's go over to the Union Hall and get some more men" (R. 4210), and "We will get you scabs" (R. 4217). The police warned the three victims to remain hidden because they were unable to protect them from the pursuing mob (R. 3623, 4217). The police finally assisted the victims to escape to the rear of the swamp (R. 4211, 4217-4218, 4172-4173).

In view of these developments, it is inconceivable that this was an ordinary accident between two cars alone

on the road as Dausy and Gayanish testified (R. 1607, 1608, 1720-1721, 1728). The arrival at this hour of the night of a crowd of pursuers at the scene of the accident at almost the instant it occurred (R. 3618) is explained only by the fact that the Plymouth was chased down Castro Street by several cars, with Dausy's station wagon leading the chase (R. 4196-4197, 4215-4216). Those who pursued James, et al., into the swamp with shouts of "scab" and "strike breakers" had obviously, along with complainants Dausy and Gayanich, followed the Plymouth from the place near No. 1 Gate where Andrews and Brascresco jumped over the fence to go to work.

(b) The evidence amply justified discharge.

The findings of the trial examiner, adopted by the Board, were that "Dausy and Gayanich were not 'chasing' or 'following' James's car but were just proceeding in a lawful manner and that their actions that night, in no way, can be construed as being such as to warrant a finding that they were engaged in illegal, unprotected activities or conduct" (R. 302).

This finding rests on the bare denials of Dausy and Gayanich. It means the rejection of the testimony of the police officers as well as the three victims and Sherwood. It leaves unexplained the receipt by the police over the radio of information regarding a chase and the pursuit of the victims into the swamp.

The Act protects the rights of nonstrikers as well as strikers. Employees have a right to refrain from striking and the right to go to and from work without restraint or coercion while the strike is in progress. The fact that

James and his companions had assisted nonstrikers to go to work did not make them open game for pursuit and intimidation. The Board itself has recognized the unlawfulness of the type of pursuit shown by the evidence here. In *Int'l Longshoremen's and Warehousemen's Union* (1948) 79 NLRB 1487 it held, p. 1505:

"The conduct of the strikers and their companions, quite apart from the words they used, in trailing the greatly outnumbered little group of strikebreakers for a considerable distance through the town was clearly intimidatory. This pursuit away from the plant by an inimical superior force clearly conveyed the unspoken threat that the strikebreakers might well be subjected to bodily harm. As such it was hardly less coercive within the meaning of section 8(b)(1) than an express threat of physical violence."

It was for such conduct that Dausy and Gayanish were discharged. The pursuit, "in this atmosphere of violence, assumed added coercive significance."⁴⁰ It was clearly unlawful and unprotected. It may be that the evidence would not be sufficient to establish the guilt of Dausy and Gayanich beyond a reasonable doubt in a criminal action. But it cannot be denied, in view of this record, that the Company's action was based on evidence which, to a fair mind amply justified discharge.⁴¹

⁴⁰*Cory Corporation* (Local No. 1150, United Elec., Radio & Machine Workers) (1949) 84 NLRB 972, 973.

⁴¹See: *Albrecht v. National Labor Relations Board* (7 Cir. 1950) 181 F.2d 652, 659.

3. OBSTRUCTION OF RAILROAD TRACKS ON OCTOBER 6TH—COMPLAINANTS HERE INVOLVED: BRADLEY, BROCK AND GUNTER.

(a) The evidence on obstruction of railroad tracks.

On October 6, 1948, three pickets blocked the movement of a locomotive at No. 31 Gate by standing and walking on the track so as to prevent it from entering the refinery. Bradley, Brock and Gunter were identified as the pickets, were charged with violation of the state court restraining order (Resp. Exh. 81, 83) and convicted of contempt and fined (R. 147, 160, 168-171, 189-193).

Acting Chief of Police Phipps testified that the pickets continued to walk back and forth across the track in the path of the oncoming locomotive until it stopped; that he told Bradley, leader of the group, he was blocking the railroad entrance and referred to the provisions of the court restraining order; that Bradley said "he would not move, that he would lay down on the track first" (R. 3123). Police Officer Baroni's testimony is in accord with the testimony of Chief Phipps. He identified Brock as one of the pickets and testified that "if the train had proceeded it would have run over these men on the track" (R. 3592-3593). Gunter admitted being the other picket (R. 1527).

Bradley claimed he only walked back and forth parallel with the track. Brock testified that he did not stand on or walk across the track while the locomotive was within fifty yards. Gunter could not remember.

The moving picture taken at the scene and introduced in evidence (Resp. Exh. 43) corroborates the testimony of the police officers. Bradley admitted on the witness

stand that he "didn't care nothing" about police orders (R. 1363) or court restraining orders (R. 1341).

(b) The evidence amply justified discharge.

The trial examiner found that the pickets did not prevent the locomotive from entering the refinery because the Company itself had barricaded the gate "so that no vehicle could enter or leave." On this the Board correctly found the trial examiner was in error (R. 215).

But the Board (one member dissenting) goes on to hold (R. 215-216):

"Bradley's conduct in picketing across the railroad tracks is no different from the picketing engaged in by striker Charles Borreani⁴² across the entrance way to the Respondent's parking lot which we hereinafter find to be protected activity. The record does not establish that Bradley was blocking ingress by merely walking back and forth across the track when an approaching locomotive was some distance away. Nor do we regard Bradley's mere statement, uttered in the heat of controversy, that he would lie down on the tracks rather than permit passage of trains, as sufficient under the circumstances to constitute an attempt to block entry to the refinery."

It may be that neither Bradley, Brock nor Gunter could physically block the passage of an approaching locomotive "by merely walking back and forth across the track" if the locomotive engineer were determined to enter the plant regardless of their safety. The fact is, however, that

⁴²Borreani "walked back and forth across the entrance way to Respondent's parking lot; he was bumped by cars seeking to enter; police pulled him out of the way twice" (R. 218).

they did block the passage of the train and as held in *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, this justified their discharge.

Bradley's statement to the police that he would lie down on the tracks rather than permit passage of the train may not be sufficient in itself, as the Board states, "to constitute an attempt to block entry to the refinery" (R. 216). It does, however, establish beyond question his state of mind and purpose in continuing with the other pickets to walk on the track in front of the approaching locomotive. The blocking of the track was not unwitting nor was it incidental to lawful picketing. It was intentional and in addition to being a deliberate violation of a duly issued restraining order, it did not constitute an activity protected under the Act.

We submit that a preponderance of the evidence in this case establishes that this conduct, condemned by the state court, was the sole reason for the discharge of the three complainants here involved and justified discharge.

**4. ASSAULT AT GATE NO. 16 ON OCTOBER 8TH—COMPLAINANTS
HERE INVOLVED: LODS AND MacDONALD.**

(a) The evidence on the assault at Gate No. 16.

On the evening of October 8th a meeting was held in Richmond of one of the AFL unions whose members were not on strike. A group of nonstrikers attended and shortly after 11 P.M. returned to the refinery in three cars. An occupant of each of the three cars testified that the cars proceeded very slowly through the refinery gate; that as the second car went through the picket line the left rear door window was smashed (R. 4108); that as the

third car went through the line the pickets hurled rocks and missiles, breaking the car windows and knocking holes in the side of the car (R. 4055-4056); that the third car stalled a short distance inside the gate and the occupants of all three cars got out to push the stalled car which was being stoned by the pickets (R. 4057, 4086, 4110). Reinforcements joined the pickets (R. 4067; Resp. Exh. 27) and a general rock fight followed. Photographs of one of the cars showing extensive damage was introduced (Resp. Exh. 25, 26).

Nonstriker Sherwood testified that as the car in which he was riding went through the picket line he saw a picket with a rock in his hand, that he saw the picket bring his arm up as if to throw, that he, Sherwood, had a slingshot, and that (R. 4085):

“I told this guy, I said ‘You let go and I let go.’ He didn’t let his rock go so I held onto mine.”

Orman Kelley, a guard temporarily hired by the Company during the strike and stationed at the gate at the time, testified as a General Counsel’s witness. He testified that he saw one of the occupants of the car aim a slingshot out the window of the car as it went in the gate, but did not see him shoot it, nor did he see anyone hit at that time (R. 4469). He testified that as the cars went in the gate he heard the sound of broken glass; that he did not see what caused it; that the last car was barely through the gate when he heard this crash of glass; and that the crash is what started the ensuing fight (R. 4472, 4488).

In the fight which followed between the returning workers and the pickets, two of the complainants, Lewis Mac-

Donald and Bert F. Lods, were injured by flying missiles. They and another picket, complainant Wyatt, testified that they saw nothing thrown and heard nothing as the cars crossed the picket line (R. 2257, 2258, 2284-2286, 1063). MacDonald admitted he was standing on the right as the cars went through the gate (R. 2284). Lods claimed he was on the coffee detail and had gone to the gate to pick up coffee cups, although he also indicated he was doing picket duty (R. 2275).

After the fight the pickets told the workers, "One of your own buddies called up and told us you were coming and we were waiting for you" (R. 4089).

Shortly after the attack, there came to the attention of the Company's general manager Rowell a sheet headed "Picket Line News" of the kind circulated among the pickets from time to time during the strike, which stated, regarding the incident, "Thanks to a tip-off from a boiler-maker, our reserves were moved to the scene" (R. 4365; Resp. Exh. 27).

The Company made an investigation of the melee and concluded that the nonstrikers had been the victims of a planned attack and had acted in self-defense (R. 4404-4405), and discharged Lods and MacDonald.

(b) The evidence amply justified discharge.

The trial examiner found that in his opinion "the melee at Gate No. 16 on October 8th, was started by the occupants of the three cars led by Sherwood" (R. 359). The finding is that Sherwood, who was in the first car, instead of threatening the pickets with retaliation if they used the rocks they were holding, as he testified, actually

used the slingshot and hit one of the pickets and that started the melee (R. 359). There is no evidence whatever to support this surmise.

There is not a single line of testimony or evidence of any kind that any picket was hit or assaulted or that anything was thrown at or shot at any picket by anyone until *after* the workers' cars had passed through the gate, at which time they were severely battered and smashed by the strikers.

That the pickets initiated the fight by smashing two of the three cars as they went through the gate is clearly established by the testimony of the General Counsel's own witness Kelley, that the crashing of glass as the cars went through the picket line "started it" (R. 4488).

Lods, though not one of the regular pickets, admitted he was directly in the gateway when the fight started and that he may have fallen inside the gate (R. 2261).

The evidence shows that MacDonald was standing on the right as the car went through the gate (R. 2284), that a picket standing there held a rock (R. 4085) and that two cars were damaged on the right side while passing through the gate (R. 4056, 4113). MacDonald's denial that anyone outside threw rocks, and that there was no crash of glass as the cars entered the gate is reason enough to attach no credibility to his bare denial that he took no part in the attack.

In determining whether the Company's general manager was reasonable in concluding that the melee was the result of planned attack by the strikers, we ask the Court to consider, in addition to the testimony of the eye wit-

nesses, the admission in the bulletin of the striking union that "Thanks to a tip-off from a boilermaker, our reserves were moved to the scene" (Resp. Exh. 27) and the testimony that after the fight the pickets told the non-strikers "Pretty good! One of your own buddies called up and told us you were coming and we were waiting for you" (R. 4089). We submit that the preponderance of the evidence clearly sustains the judgment of the Company.

5. YACHT HARBOR ASSAULT ON OCTOBER 12TH—COMPLAINANTS HERE INVOLVED: ALCARAZ, COLEMAN, OGDEN, MARTINEZ, MOCZKOWSKI AND B. VETTER.

(a) The evidence on the Yacht Harbor assault.

Before dawn on the morning of October 12th five employees attempted to return to work. They drove toward the end of a peninsula west of the refinery and followed a dead-end road to a railroad track, at a point known as Clark's Yacht Harbor. They had intended to drive along the railroad ties into the rear area of the refinery. Before they could reach the refinery they were assaulted and chased by a group of men who lay in wait in the dark along the railroad track.

As a result of circumstances which will be reviewed the Company decided that nine of the complainants apprehended in the vicinity were responsible for the attack and discharged them.

The road to the Yacht Harbor passes through a gate⁴³ a little more than a mile from the Yacht Harbor. During the strike the Company maintained watchmen at this gate

⁴³Referred to in the record as the "Naval Depot Gate."

who recorded the make and license number of all cars passing through the gate and also noted in a book the number of passengers in each car (Resp. Exh. 67). The road passing through this gate is the only highway to the Yacht Harbor. This record shows that between 12:00 M. on October 11, 1948, and 5:19 A.M. on October 12th, all cars passing through the gate toward the Yacht Harbor had returned through the same gate (Resp. Exh. 67).

At 5:19 A.M. a car owned and driven by the complainant Coleman passed through the gate and proceeded toward the Yacht Harbor (Resp. Exh. 67, 72). With Coleman were complainants Ogden, B. Vetter and Hiawatha Autry, as to whom the Board refused to issue a complaint.

At 5:20 A.M. a car owned and driven by the complainant Moczowski passed through the gate and proceeded toward the Yacht Harbor (Resp. Exh. 67, 73). With Moczowski were complainants Alcaraz, Martinez and Patrick A. MacDonald, as to whom the complaint was dismissed, and one George Vetter.

Each car, according to its occupants, when it reached the Yacht Harbor was parked under or near a certain floodlight in that area, remained parked for 15 or 20 minutes and then was driven back to the above-mentioned gate where they were both stopped at 5:50 A.M. (Resp. Exh. 67).

Allowing for driving time, the two cars were parked at the Yacht Harbor from approximately 5:26 A.M. to 5:45 A.M. The occupants of each car admitted that some, if

not all, of them got out. Yet, unbelievable as it may seem, the occupants of neither car would admit at any time seeing the other car or its occupants.

At 5:29 A.M., while the two cars of the complainants were still at the Yacht Harbor, the car occupied by the victims of the subsequent attack passed through the gate in question and proceeded to the Yacht Harbor (Resp. Exh. 67, 74). In this car were nonstrikers Tieger, the driver, and Paasch, Vaughn, Antaki and Dailey (R. 3923-3924). They took this roundabout route to work because, as Dailey testified, they were afraid of being molested if they attempted to go through the picket lines (R. 3924-3925).

Tieger drove through the parking area at the Yacht Harbor and started down the railroad track. At this point they saw two unoccupied cars (R. 3927, 4003-4004). About 200 feet from the parking area they found the way blockaded by ties and steel girders. The car was stopped and as the five nonstrikers were removing the obstruction they were attacked by a group of men, shouting vile names and throwing rocks. They were beaten with sticks and Vaughn was kicked in the mouth (R. 4006-4008, 4025).

After the attack, two of the nonstrikers, Vaughn and Antaki, who had been knocked down, got up and climbed over a hill and eventually found their way into the refinery. Vaughn testified that as he and Antaki were climbing the hill, about 15 minutes after the attack, they saw two cars leave the vicinity of the attack (R. 4010).

Nonstrikers Dailey and Tieger escaped in the latter's car by backing along the railroad track, and then driving over a hill toward the Naval Depot Gate (R. 3933-3934).

Before reaching the gate, just before 5:50 A.M., they reported the incident to a Company guard at what is known as the TCC Salt Water Station (R. 3934-3935).

The other nonstriker, Paasch, while hiding under a barge saw two cars leave the Yacht Harbor area about 10 minutes after the attack or about 5:45 A.M. (R. 4026). Approximately 5 minutes later, while Tieger and Dailey were reporting to the guard at the Salt Water Station, two cars were seen coming from the Yacht Harbor and Tieger and Dailey told the guards, "Looks like a couple of cars that were out there" (R. 3935-3936). The guards stopped the two cars at 5:50 A.M. (R. 3936, Resp. Exh. 67). These were complainant Coleman's car and complainant Moczkowski's car.

Shortly thereafter, nonstrikers Dailey and Tieger returned to the Yacht Harbor with the police, the two cars previously seen in the parking area were gone, and the scene of the attack was deserted (R. 3947-3948, 3957-3958).

As to what transpired during the early morning hours of October 12th, the testimony of the complainants varied greatly.⁴⁴ In one respect, however, their testimony was

⁴⁴Martinez testified they left the Union Hall about an hour and a half after 11:00 P.M. (R. 1114-1115); Alcaraz, that they left about 1:00 or 1:30 A.M. (R. 1778); MacDonald, that they left about 3:30 or 3:45 A.M. (R. 2323); and Moczkowski, that they left five or six hours after 11:00 or 11:30 P.M. (R. 2112). B. Vetter testified that they left the Union Hall about 3:30 or 4:00 A.M. (R. 1883); Coleman, that they left between 4:00 and 4:30 A.M. (R. 1978); and Ogden that they left about 5:00 A.M. or 5:30 A.M. (R. 2655). Alcaraz testified they parked under "a big floodlight" (R. 1783); Moczkowski testified, "It wasn't a very big light" (R. 2136). Vetter, Ogden and Coleman were all in the same car; however, Coleman testified all of the occupants got out of the car at the Yacht Harbor (R. 1987); Ogden, that only two of the four occupants got out of the car (R. 2657); and Vetter testified no one got out of the car at the parking lot and that the car did not even stop there (R. 1887, 1893).

markedly similar. Although the two cars of the complainants and nonstriker Tieger's car within minutes of each other passed along the only road into the Yacht Harbor, going and coming, and parked in or passed through the parking area which was at least partly illuminated, each of the involved complainants⁴⁵ denied that the car in which he rode passed any other car, that any other car arrived at or left or passed through the parking area while he was there, or that he saw, other than the occupants of the car in which he was riding, any other persons at or about the Yacht Harbor area. The physical facts and the undisputed evidence make these denials unbelievable. The conflicting testimony and the unbelievable denials of these complainants destroy the credibility of their story that they drove to the Yacht Harbor in the early morning hours merely for the ride and that they saw nothing and they did nothing while there.

As the attack was sudden and before daylight, with only partial illumination from automobile headlights at the scene, recognition or positive identification of the assailants by the victims was not possible. Vaughn, Dailey and Paasch each so testified (R. 4009, 3944, 3952, 4025). The beaten men did, however, obtain some impression of the appearance and dress of their attackers (R. 4007, 4025, 3931-3932). There were similarities in the appearance and dress of the group stopped at the gate (R. 3937-3939, 2128-2129, 1114). When asked by the police at the Naval Depot gate if they could identify their assailants,

⁴⁵Alcaraz (R. 1785-1786, 1788), Coleman (R. 1983-1984, 1987), Martinez (R. 1112-1113, 1118), MacDonald (R. 2324, 2328-2330), Moczowski (R. 2117-2118, 2120-2121), Ogden (R. 2658), and Vetter (R. 1886, 1890).

Vaughn, Tieger, Dailey and Antaki all truthfully said they could not (R. 4016, 3939, 3953).

(b) The evidence amply justified discharge.

That an unlawful attack was made on five workers attempting to return to their jobs in the early morning hours of October 12th is not disputed.

The identification of the attackers by the victims of the attack, however, was admittedly fragmentary. The case as far as these complainants are concerned is almost wholly circumstantial. But, as this court has said, "Circumstantial evidence may be as cogent and convincing as direct evidence."⁴⁶

The time record maintained by the guards at the gate together with the complainants' testimony as to the route they drove after entering the gate without question places the complainants in the vicinity of the attack when it occurred. Yet the trial examiner concluded "that none of the occupants of Moczkowski's and Coleman's cars were in the vicinity of the place of the attack at the time it was being committed" (R. 257). We submit that such a finding is clearly contrary to the preponderance of the evidence.

The Naval Depot gate records were identified, explained and introduced in evidence (Resp. Exh. 67, 72, 73, 74; R. 3905-3918, 4441-4444), and show to the exact minute when the complainants went through the gate to the Yacht Harbor and when they returned. Yet there is no finding of even the approximate time the complainants were at the Yacht Harbor. As to the complainants, the only reference

⁴⁶*Rocona v. Guy Atkinson Co.* (9 Cir. 1949) 173 F.2d 661, 665.

to time is the finding that Alcaraz and the others decided to go for a ride "at about 4 o'clock" (R. 245). As to the time of the attack, the findings merely state that it occurred "on the morning of October 12" (R. 249).

It was not upon these partial facts that the Company concluded that the occupants of the two cars which were stopped at the Naval Depot gate at 5:50 A.M. must have been involved in the attack. The Company knew the complainants were in the vicinity between 5:20 A.M. and 5:50 A.M., and that the attack occurred sometime between 5:29 A.M. and 5:50 A.M. Allowing for driving time, it will be seen that the complainants must have been in the Yacht Harbor area when the attack occurred. To these facts add the testimony of nonstrikers Vaughn and Antaki that as they climbed a hill to escape and of Paasch that as he hid under a barge they saw two cars leave the Yacht Harbor on the road back to the gate where a few minutes later the two cars were sighted by Dailey and Tieger and stopped by the guard, as shown by the time book, at 5:50 A.M. Add to this the fact that shortly thereafter the police with Dailey and Tieger returned to the Yacht Harbor and found the area deserted. These facts, coupled with the victims' description of the attackers, fragmentary as it was, furnished a closely connected train of circumstances which lead with more than reasonable certainty to the conclusion that these complainants were the attackers. There is nothing in the record to show that the Company's judgment in reaching that conclusion was affected by anything other than these proven circumstances.

The trial examiner found "that Paasch, and Vaughn [two of the five victims of the attack] not only admitted to the police officers at the Naval Depot gate, a few hours after the attack, that none of the occupants of Moczkowski's and Coleman's cars were among the persons who had committed the attacks, but they also renewed these admissions at the hearing herein" (R. 254). Nowhere in the testimony of either Paasch or Vaughn is to be found any such admission. The Board properly rejects this finding as erroneous as to Paasch (R. 209, note 1). Paasch was not at the Naval Gate at the time. Vaughn testified that he told the police, and he honestly admitted at the hearing, that he could not identify the complainants as his attackers. On the other hand, he made no such statement, as is attributed to him by the trial examiner, that none of the complainants were among the persons who committed the attack.

The findings distort in the same way the testimony of the nonstriker Dailey. Dailey testified that he did not know whether the apprehended men were the attackers (R. 3939, 3941) and he did not, as the Board found, state that the suspects were not among the attackers.

Dailey testified that though he could not with certainty identify the men apprehended at the gate as his attackers he did notice similarities of dress and appearance. He mentioned this to the police who said "That is not enough for an arrest by something like clothing" (R. 3951). He also set forth the facts in this regard in a written statement furnished the Board field examiner on December 21, 1948. This statement is quoted in the findings (R. 255-257) apparently as evidence of impeachment. Neither the General Counsel who introduced the

statement in evidence nor the trial examiner who relies on it to discredit the witness points to any material inconsistency between the statement given in December, 1948, and the witness's testimony eight months later.

6. ROCK THROWING AT GATE NO. 1 ON OCTOBER 18TH—COMPLAINANTS HERE INVOLVED: DONALDSON AND OTTINO.

(a) The evidence on rock throwing at Gate No. 1.

On the morning of October 18, 1948, although warned by police over a loudspeaker of the terms of the Superior Court restraining order (R. 3477-3478, 3512), a large crowd of men gathered outside No. 1 Gate of the Company's refinery. About 7:00 A.M. a car drove through the gate into the refinery, and the pickets battered it with heavy rocks (R. 3478, 3513, 4311; Resp. Exh. 19). This precipitated a rock fight between the men inside and those outside the gate. Identified in the crowd outside the gate were the complainants Donaldson and Ottino, each of whom first denied and then reluctantly admitted participating in the rock throwing.

Neither Donaldson nor Ottino was a straightforward or honest witness. Donaldson's testimony, that he was "pretty sure" he didn't throw anything that morning was false by his own subsequent admission that he "did heave one rock * * * fairly good sized, like a baseball, maybe" (R. 1665-1666). Likewise Ottino's testimony that he "was just standing around" and was not throwing rocks proved not to be truthful. Ottino's reluctant admission that he "tried" to throw over the fence "twice, I believe," confirms the testimony of witness Canali regarding Ottino that "He picked up the rocks and he threw his arm like throwing a baseball, and then stooped and done the same thing again" (R. 4316-4317).

b) The evidence amply justified discharge.

In spite of Donaldson's admission at the hearing that he threw a rock the size of a baseball in the direction of a refinery building around which a group of non-strikers were gathered (R. 1665) the trial examiner found that "the credible evidence shows that Donaldson took no part in the rock throwing" (R. 308). The Board properly rejected the finding as erroneous (R. 209, note 1), but, without further discussion, orders the Company to reinstate Donaldson.

As to the other complainant, the trial examiner found (R. 385): "Admittedly, Ottino threw two stones in the direction of the people at the boiler house," but recommends reinstatement because "the Respondent did not discipline non-strikers for throwing rocks." The Board rejects the trial examiner's rationale (R. 216-217), but (one member dissenting) orders Ottino's reinstatement on the ground that his conduct "was not of such a serious nature as to pass the limits of protected activity" (R. 217).

In the process of enacting the Labor Management Relations Act of 1947, Congress specifically condemned attempts by the Board "to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement."⁴⁷ Long before this the Supreme Court, referring to the Wagner Act, said "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land."⁴⁸

⁴⁷House Report No. 510, U.S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, pp. 1144-1145.

⁴⁸*Labor Board v. Fansteel Corp.* (1939) 306 U.S. 240, 257-258.

Nevertheless, the Board throughout this case, and particularly in its treatment of the convicted mass picketers and these admitted rock throwers, has attempted an arbitrary and unauthorized segregation of "serious" from the "not so serious" lawbreakers in determining which employees had been lawfully and which unlawfully discharged. We submit that an employer's right to discharge does not depend upon such nebulous distinctions.

7. AMBUSH ON WINEHAVEN ROAD ON OCTOBER 25TH—COMPLAINANTS HERE INVOLVED: BRAKKE, BUSHONG, COLLINGSWORTH, DAUSY, DODSON, ANTONE GAYANICH, LANGENSAND, OGDEN, PITTMAN AND SNEAD.

(a) The evidence on the ambush on Winehaven Road.

Because of an extended nightly campaign of property damage and harassment of workers which reached a peak on or just prior to October 24th, the acting Chief of Police of the City of Richmond issued special orders to his officers to put an end to this vandalism (R. 3131-3133). Investigation by police pursuant to these orders resulted in the arrest of twenty-one of the complainants during the night hours of October 24th and 25th (R. 3134, 4367).

The first arrests were made during the early morning hours of October 24th. Police officers investigating vandalism suspects found the complainant Brakke and others (R. 3523-3525) in a car with 3 "saps" or blackjacks made of cable and tape, pieces of brick, large rocks, a slingshot and other articles (Resp. Exh. 48; R. 3328, 3388-3389).

Less than 24 hours later Brakke was again apprehended by the police in another car containing an assortment of

aps and other crude weapons (Resp. Exh. 51). This incident involved an ambush after midnight on October 25th in which first a taxicab and then a police car were halted on a lonely road by a group of 14 men who lay in wait for workers using this route to get in and out of the refinery (R. 3341-3342, 3399). Workers who were afraid to use the main gates of the refinery used this road to reach an area back of the refinery where they climbed over the fence or drove down a railroad track into the refinery (R. 3344, 3924-3925, 4022-4023).

Shortly after 1:00 A.M., a taxicab driven by Roy W. Haglund on Winehaven Road toward Point Molate, while proceeding through a cut in the hill at this point in the road, was struck by a flying object and ordered to stop. According to Haglund he stopped the cab immediately and "a couple of fellows came up to the cab, seen I had sailors, said, 'It's O.K. to go on through' " (R. 3824). This testimony of the cab driver is corroborated in part by admissions at the hearing by the complainant Dausy,⁴⁹ one of the fourteen men later arrested (R. 1745-1746). At the time the cab driver noticed three cars parked along the road, two men by one car and six or eight by the other cars (R. 3825). The complainants admitted having parked in three cars along the road at this point and that some of them were out and around the cars and up and down the road (R. 1255, 1449, 1743, 2189-2190, 2710). On his return trip, when Haglund reached the place where his cab had been hit, someone "flashed" him down, "apologized for throwing the stuff at" the cab and said

⁴⁹Dausy was also involved in the pursuit out Castro Street on October 4th reviewed herein at pages 62-66.

"the boys were a little hasty" (R. 3826). The same group of men were gathered along the road (R. 3826). The complainant Wyrick, one of the fourteen men later arrested, admitted that he and Hershberger were in this group (R. 2193).

The cab driver reported the incident to police officers parked in a police car near Gate No. 16 (R. 3827-3828). They called the police inspector (R. 3828). Inspector Davis and Lieutenant Fray responded to the call, picked up the cab driver at Gate No. 16 and proceeded to the place where Haglund's cab had been hit (R. 3330-3331, 3395-3396, 3828).

As the police car came to this point in the road, a man crouched beside the road with a flashlight and signalled it to stop (R. 3333, 3397, 3829). As Lieutenant Fray got out of the car, another man came up with rocks in his hands "in a threatening manner" and ten or twelve men appeared out of the darkness (R. 3334, 3397, 3452). The police officer in the car called on the police radio for assistance (R. 3334, 3398) and when more officers arrived the men were ordered to line up by the three cars, a Mercury, a Pontiac and a Chevrolet, parked on the side of the road, and the cars were searched (R. 3341-3343, 3400). The men told the police they had heard that Standard Oil workers were using that road to get into the plant, and they were out there to stop men from going through to work (R. 3342, 3399). In the cars were found clubs, sticks, pieces of rope, a piece of cable, a slingshot and other articles (Resp. Exh. 46, 49, 50, 51). Fourteen men were arrested, including complainants Antone Gayanich, Collinsworth, Dausy, Snead, Dodson, Bushong,

Langensand, Pittman, Brakke and Odgen. In addition, the police arrested one Alva Clark, not an employee of respondent, Hiawatha Autry, as to whom the Board refused to issue a complaint, and Wyrick and Hershberger, as to whom the complaint was dismissed (Resp. Exh. 46).

Ten of the men arrested were examined at the hearing. All testified they were just out for a ride or killing time. None of the complainants would admit hitting or seeing the cab hit. However, the police found in one of the three cars occupied by the complainants a short piece of cable which fit precisely the dent made in the cab by the missile which struck it that night (Resp. Exh. 53; R. 3413-3415). Bushong, Langensand, Ogden and Snead claimed either that they did not see the cab or that they did not see it stop at any time (R. 2709, 2795, 2652, 1312). Wyrick saw it stop only on the return trip (R. 2191). A. Gayanich saw it stop 100 feet and Collinsworth from 100 to 150 feet from the car in which they had come to the scene (R. 2031, 1257, 1259). Pittman claimed it stopped "down the road a ways where the other cars were" (R. 2543), as did Brakke (R. 1446). Dausy admitted the cab stopped opposite the point along the road where he and others in the group were gathered (R. 1744).

The cab driver testified that when he returned to the scene of the incident with the police officers he could not identify any particular individual, but that "It did look like the same group," and he saw one man with a red plaid jacket and another with a suntan jacket that he had seen before (R. 3830). He testified he told the police they were the same groups and he "knew for sure on account of the way they were dressed the first time" (R. 3836).

He truthfully testified that he did not see and consequently could not identify which one of the group had hit his cab (R. 3837). Police Lieutenant Fray corroborates the cab driver. He testified that while Haglund could not identify the person who hit his cab (R. 3364) he recognized the group and where the incident happened (R. 3371). In view of the admissions of the complainants Dausy (R. 1745-1746) and Wyrick (R. 2193-2194) there can be no doubt that the group which waylaid the cab between 1:00 and 2:00 A.M. was the same group which a few minutes later stopped the police car.

Lieutenant Fray who, the Board found, testified in a straight forward and impressive manner (R. 277) further testified that when he asked the group at the scene what they were doing out there, "I don't know how many answered the questions, but they said, 'We are out here because we have information that the workers from the Standard Oil are using this road to get into the plant'" (R. 3341-3342) and that they were there to stop workers from "sneaking out that way and over the fence" into the plant (R. 3338). Inspector Davis testified that the group said "they didn't want anybody going through there that might be going into the Standard Oil Company" (R. 3399).

(b) The evidence amply justified discharge.

The Board concluded that the Company unlawfully discharged Brakke and the other complainants because "neither Brakke nor the 13 other men arrested with him on the morning of October 25 were involved in the Haglund incident" (R. 278) although the Board also found "Each of them admitted, however, being in the vicinity

of the place where Haglund testified his cab had been hit" (R. 277). This conclusion is based upon the following:

"Haglund testified that he recognized two of the men who approached his cab immediately after it had been hit. He further testified that these two men were among those arrested. Police Lieutenant Fray, the officer in charge of the approximately 14 police officers who made the aforesaid arrests, testified * * * that Haglund stated that he could not identify anyone of the 14 men. The undersigned was very favorably impressed with the straightforward manner in which Fray testified and finds that Haglund did not testify truthfully when he stated that two of the men who approached his cab after it had been hit were among the 14 men arrested."

The Board has misread the record. Lieutenant Fray did *not* testify "that Haglund stated that he could not identify anyone of the 14 men." Fray testified, as Haglund himself testified, that he could not say which one of the 14 persons had hit the cab (R. 3363-3364, 3370). Fray's testimony does not in any way contradict or discredit the cab driver Haglund.

Haglund's testimony that the group arrested was the same group that was at the scene a few minutes earlier when his cab was hit is beyond dispute in view of the admissions of the complainant Dausy (R. 1745-1746). The trial examiner's contrary conclusion is insupportable.

We have seen in connection with the assault at Clark's Yacht Harbor⁵⁰ how the findings twist the testimony of

⁵⁰Supra p. 81.

Vaughn and of Dailey, victims of the attack, that they could not identify the attackers into a statement that the apprehended complainants were not the attackers. In a similar manner in this case, the testimony of Lieutenant Fray that Haglund could not say which individual hit his cab is twisted into a statement that Haglund could not identify anyone in the group apprehended as in the group when his cab was hit. The grounds upon which the trial examiner attempted to discredit the cab driver are without foundation of any kind in the record. His testimony is fully corroborated by the testimony of the police officers which the trial examiner credits. Further, we submit that the testimony of the police officers alone establishes the unlawful nature and purpose of the complainants' rendezvous on this road that night.

The manner in which the group stopped first the cab and then the police car, the failure of the complainants to give any plausible reason for congregating in such numbers at this remote point after midnight, the finding of an assortment of clubs and other weapons in the complainants' cars, coupled with the admission by the complainants testified to by Lieutenant Fray and Inspector Davis that they were out there to stop workers from sneaking over the fence and into the plant, establish by a preponderance of the evidence that these complainants were engaged in an unlawful attempt to prevent by force, threats and intimidation workers from going to work in the refinery.

There is no evidence of any kind that these complainants were engaged in nor did any of them claim they

were engaged in any activity protected by the Act during the early morning hours of October 25th, nor is there evidence of any kind in the record that any of them were refused reinstatement by the Company for any legally protected activity.

8. FURTHER ARRESTS ON OCTOBER 25TH—COMPLAINANTS HERE INVOLVED: HARDIN AND KELLEY.

(a) The evidence on further arrests.

A few hours after the taxicab had been waylaid on the Winehaven Road, at approximately 4:30 A.M. on October 25th, the city police observed a coupe follow a cab south on Castro Street and turn west on Standard Avenue going toward Point Molate (R. 3678). After the two cars turned into Standard Avenue, the coupe started to draw up beside the cab, and the police car followed. Several blocks west on Standard Avenue, the coupe crowded the taxicab to the curb where both stopped. As one of the men in the coupe got out and went over to the cab, the police came up (R. 3679). The cab driver told the police the men in the coupe had "demanded that he pull over, turn his dome light on, that they wanted to see what he had in the cab" (R. 3680). The men in the coupe were the complainants Hardin and Kelley (R. 3681). When asked by the police why they stopped the cab, Hardin said he "wanted to see who was in it" (R. 3707). In Hardin's pocket was found a large ball bearing tied in the corner of a handkerchief (R. 3682). Four large rocks, a short piece of lead cable, an ice pick and other objects were found in the car (Resp. Exh. 61; R. 3688-3689). Hardin and Kelley were arrested and charged with violation of the Deadly Weapons Act (Resp. Exh. 60).

Hardin and Kelley disagree on where they had been and where they were going at the time. Hardin testified that he and Kelley had been to No. 31 Gate on Castro Street, and had driven south on Castro Street and west on Standard Avenue (R. 2072). This admission corroborates Police Sergeant Warner who testified he saw the coupe follow the cab south on Castro Street and turn west onto Standard Avenue (R. 3677-3678). Contradicting Hardin, Kelley testified he was positive they did not drive up Castro Street (R. 860). Both Hardin and Kelley claimed they knew nothing of the rocks or the piece of cable found in the car (R. 869, 2077-2079). Hardin denied the ball bearing tied in his handkerchief was a sap or "persuader" and claimed it was a "souvenir" (R. 2078).

(b) The evidence amply justified discharge.

Again we find the trial examiner distorting the testimony of a witness and attempting to discredit him upon facts without support in the record. He found that Police Sergeant Warner "testified at great length * * * about overhearing the conversation between Hardin, Kelley, and the cab driver and about hearing Hardin and Kelley make certain admissions to the other police officers * * *" (R. 333-334). There is not a word of such testimony by Warner in the record. The trial examiner further found that when Warner was asked why the police seized a flashlight,⁵¹ "Warner said, in effect, because the flashlight could have been used as a blackjack" (R. 334). We are unable to find any such testimony in the record. Nevertheless, on the basis of the foregoing, the trial examiner concluded that Warner "was far from a credible witness."

⁵¹See Resp. Exh. 61.

The Board recognizes, in part, the trial examiner's error and notes that Officer Warner did *not* testify "that he overheard a conversation between Hardin, Kelley, and a cab driver on October 25, 1948, as set forth in the Intermediate Report" (R. 209, note 1). In spite of the fact that there is no justification whatever in the record to discredit the police officer, the Board like the trial examiner, accepts the glib story of Hardin and Kelley that they did not stop the taxicab, the cab driver stopped them and that they knew nothing about the rocks and other articles found in the car.

Whether or not the coupe crowded the cab to the curb, as it appeared to the police officers, it is obvious from the admissions of Hardin and Kelley that the cab driver was aware of being pursued and was concerned for his safety. Another cab driver testified that one night during this period about 2 A.M. in the same vicinity, a group of men "stopped me and told me to turn my dome light on or I might get the cab turned over" (R. 3831). The record shows that on another occasion a taxicab was followed from the refinery for about a mile and then turned over on its side by a group of unidentified men (R. 2732-2735).

In view of this series of attacks on taxicabs, and the waylaying of the cab by a group of the complainants on Winehaven Road but a few hours before, it is impossible to attach to the conduct of Hardin and Kelley the innocent motives they professed. The unexplained following of the cab, the warning given the cab driver, and the finding by police of rocks and a short piece of lead pipe in the complainants' car all fit the pattern of planned vandalism and intimidation.

9. **ATTEMPTED ACTS OF SABOTAGE—COMPLAINANTS HERE INVOLVED: LEIGHTY, BRIGHT, HALL, MORGAN AND VANEK.**

(a) The evidence on attempted acts of sabotage.

During the strike there were several attempts to sabotage operation of the Company's refinery. During the evening of September 21st, approximately a mile and a half north of the plant, in an isolated district, padlocks on certain gas valves were broken and the valves closed, shutting off the supply of natural gas to the refinery (R. 4353-4355, 2939-2941). On the same evening at the same hour, at a point 3 or 4 miles away, a switch was pulled on the main power plant (R. 4356, 2941). Natural gas is one of the principal fuels used in the refinery. Cessation of gas or a change in the supply of gas to the cracking units operating at very high temperatures and high pressures could be extremely hazardous to equipment and to personnel (R. 4354-4355). Serious damage was avoided because the workers in the refinery were alerted to the danger by constant rumors of threatened sabotage and were prepared to meet the emergency when it occurred by switching from gas to fuel oil (R. 4355). Subsequently, the bottom valves on five 60,000-barrel gasoline storage tanks were found open at the Company's San Pablo tank farm, five miles north of the refinery (R. 4357).

Charles Camren, who had been on strike and returned to work before the end of the strike, testified that in the early part of November, about 4 or 4:30 in the morning, he was called to the telephone, and the party calling said, to quote Camren, "If you don't get out of there I am going to tell what I know about the gas valve" (R. 4041). Camren identified the caller as the complainant Leighty.

He had worked with Leighty, talked to him on occasions on the telephone before, and Leighty was one of the few people outside the refinery who knew he was working at the time of the call (R. 4044-4045). Leighty admitted talking to Camren on the telephone, claiming Camren had called him, but denied making the statement about the gas valves (R. 4460-4462). He admitted working with Camren, having telephone conversations on occasions with Camren, and knowing that Camren had returned to work before the end of the strike (R. 2778, 4460-4461). Leighty also admitted that, having been "broken in for shift foreman" in the Utility Department, he was familiar with the location of the valves in question and the control of the valves over the illuminating gas supply to the refinery (R. 2776). There is nothing in the record to suggest any reason to doubt the truth of Camren's testimony.

Near the end of September an incendiary missile referred to as a "smoke bomb" which had been ignited and burned out was found inside the refinery fence approximately 30 feet from certain high pressure butane tanks (R. 2948, 3072-3074). It was about the size of a gallon can (R. 2951). Tests conducted by the police showed that the so-called "bomb" made a slow fire of high temperature (R. 3076, 3481-3483). About the same time a mysterious fire which appeared to be of incendiary origin occurred during the night in a lumberyard in the refinery near the fence on Castro Street (R. 2952-2953).

During the evening of October 24th the police saw two workers leave the refinery through No. 1 Gate. Several men in a car slowly followed the workers as they walked up the street (R. 3693, 3714). When the two men boarded

a bus, the car followed the bus for another three or three and a half blocks (R. 2371, 3694, 3717). The police officers stopped the car and upon searching it found, among other things, two large rocks and a smoke bomb (R. 3696, 3719-3720); Resp. Exh. 62). The smoke bomb looked like a gallon can (R. 3696). In the car were the complainants Bright, Hall, Morgan and Vanek and a man named Page (Resp. Exh. 42). When asked what they were doing with the smoke bomb, no one knew anything about it or how it got in the car (R. 3723). The men were arrested and charged with violation of the Deadly Weapons Act (Resp. Exh. 42). Morgan testified they followed the workers from the refinery because "Those guys got a lot of guts" (R. 1685); Hall said regarding the workers "They got plenty of nerve" (R. 1699) and Bright testified they intended "to save [the workers] a lot of trouble" (R. 1522).

(b) The evidence amply justified discharge.

As to the gas valve incident, the Board, solely on the basis of how the two witnesses "impressed" the trial examiner, discredits Camren's testimony and credits the complainant Leighty's denial that he threatened in the telephone conversation with Camren "to tell what I know about the gas valve" (R. 349).

The Board finds that the smoke bomb "cannot per se be chargeable to Bright, Morgan, Hall or Vanek" and their motives were not improper (R. 286). That the plans of the complainants apprehended in the car with the smoke bomb after following the two nonstrikers went beyond peaceful persuasion is indicated by the reference to

saving the two workmen "a lot of trouble" and the admitted remarks "Those guys got a lot of guts" and "They got plenty of nerve." Furthermore, it is unbelievable that the smoke bomb, an object the size of a gallon can, found in the back seat of the car where some of the complainants were sitting should go completely unnoticed by everyone.

While the evidence does not show, and admittedly the Company was never able to determine, the complainants' responsibility for the acts of sabotage, the record shows the refusal of re-employment in these cases to be the lawful exercise by the employer of its normal right to select its employees under trying circumstances.

The entire community was terrorized by widespread vandalism and continued threat of violence. The circumstances justified strong measures. That management chose to regard Leighty's connection, whatever it was, with the unsolved mystery of the gas valves, and the connection of Bright, Morgan, Hall and Vanek with the smoke bomb, as sufficiently serious under all the circumstances to warrant their discharge does not establish either interference with or discrimination because of lawful union activities. As in regard to the other incidents, there is no evidence of any kind that any other factor entered into the consideration of the Company in the case of a single one of the complainants.

Thus, even on the erroneous theory that the Company had the burden of proving the complainants were discharged for other than lawful strike activities, the Company sustained that burden and established by a preponderance of the evidence ample justification for the discharges.

CONCLUSION.

For each of the foregoing reasons we respectfully submit that the order of the Board should be vacated and set aside and that said order and each and every part thereof should be denied enforcement.

Dated, San Francisco, California,

May 4, 1951.

Respectfully submitted,

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No. 12738

United States
Court of Appeals
for the Ninth Circuit.

FRED D. HILLIARD, as Receiver of JESSE M.
CHASE, INC., a Corporation,

Appellant,

VS.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Idaho,
Eastern Division.

FILED

JAN 10 1951

PAUL P. O'BRIEN,
CLERK

No. 12738

**United States
Court of Appeals**
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FRED D. HILLIARD, as Receiver of JESSE M.
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for the District of Idaho,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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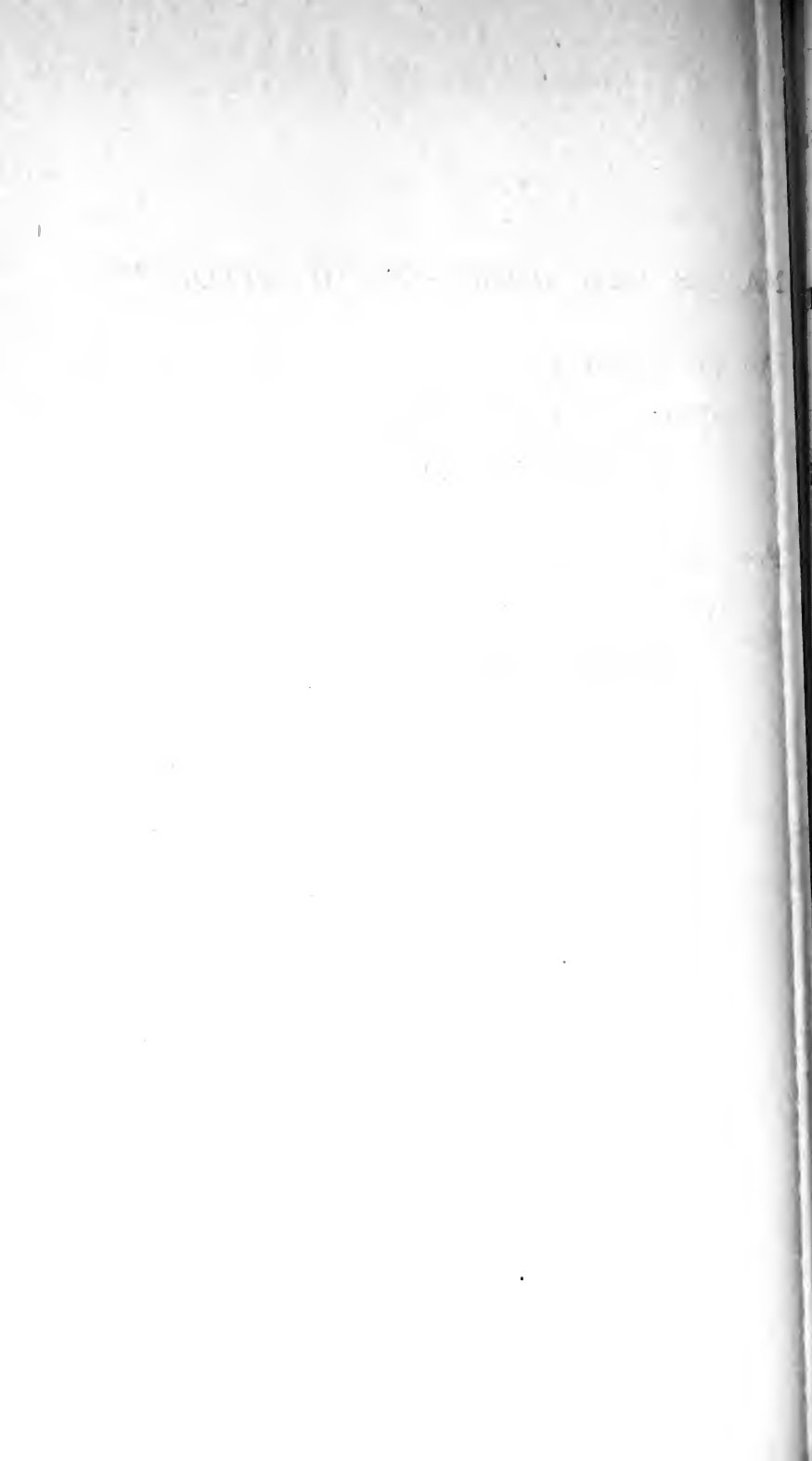
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In the District Court of the United States in and
for the District of Idaho, Eastern Division

No. 1592

FRED D. HILLIARD as Receiver of JESSE M.
CHASE, INC., a Corporation,

Plaintiff,

vs.

LOUISE B. MUSSELMAN SISIL,

Defendant.

PETITION FOR REMOVAL OF CAUSE

To the Honorable Chase A. Clark, Judge of the
United States District Court for the District of
Idaho, Eastern Division:

Comes now Louise B. Musselman Sisil, the above-named defendant and files this petition for removal of this cause from the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County, in which it is now pending, to the District Court of the United States for the District of Idaho, Eastern Division, and makes the following statement of facts which entitles the defendant to a removal of said action:

I.

That attached hereto is a copy of the Amended Complaint filed in the State District Court, said complaint is marked Exhibit "A" and by this reference made a part hereof.

II.

That the plaintiff is and at all times herein mentioned, has been a resident of the State of Idaho and that Jesse M. Chase, Inc., a corporation is an Idaho corporation with its principal place of business at Pocatello; that Louise B. Musselman Sisil, defendant is a bona fide resident of the State of California and was served with summons and complaint in the above-entitled cause on the 30th day of November, 1949.

III.

That the amount in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000; that the real estate described in plaintiff's complaint and to which title is sought to be quieted, is of the approximate value of \$70,000.00; that the defendant herein claims a lien upon said real estate by reason of a judgment obtained in the above-entitled court wherein Louise B. Musselman Sisil was plaintiff and Jesse M. Chase defendant; said judgment being in the amount of \$10,330.73; that she also claims a lien upon said property by reason of a certificate of sale issued to her by the United States Marshal for the District of Idaho and for which she bid or paid the sum of \$3,250.00.

IV.

That defendant files herewith a bond in the sum of \$500.00.

Wherefore, your petitioner prays that said cause be removed to the United States District Court for the District of Idaho, Eastern Division and for

such other and further Order as may be just and proper in the premises.

LOUISE B. MUSSELMAN
SISIL,

By /s/ B. W. DAVIS,
Her Attorney.

State of Idaho,
County of Bannock—ss.

B. W. Davis, being first duly sworn, deposes and says:

That he is the attorney for Louise B. Musselman Sisil and that he makes this verification for and on her behalf; that the reason he makes the same is because the said Louise B. Musselman Sisil is not within the State of Idaho and that this affiant is familiar with all of the facts set forth in this Petition; that he has read the above and foregoing petition, knows the contents thereof and the facts therein stated are true.

/s/ B. W. DAVIS.

Subscribed and sworn to before me this 8th day of December, 1949.

[Seal] /s/ LAURA S. GOUGH,
Notary Public.

Exhibit "A"

In the District Court of the Fifth Judicial District
of the State of Idaho, in and for Bannock County

FRED D. HILLIARD, as Receiver of JESSE M.
CHASE, INC., a Corporation,

Plaintiff,

vs.

LOUISE B. MUSSELMAN SISIL,

Defendant.

AMENDED COMPLAINT

For cause of action against the above-named defendant, plaintiff alleges:

I.

That plaintiff is the duly appointed, qualified and acting Receiver of the Jesse M. Chase, Inc., a corporation, by virtue of an order of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, in an action entitled J. A. Youngren, plaintiff, vs. Jesse M. Chase, Inc., a corporation, made on the 5th day of November, 1949, and subsequently qualification as such receiver by filing the necessary oath and giving bond as required on order of the said court.

II.

That the said Jesse M. Chase, Inc., is now, and at all the times herein mentioned, was a corporation, organized and existing under and by virtue of the

laws of the State of Idaho, with its principal place of business at Pocatello, Bannock County, Idaho.

III.

That plaintiff, as Receiver of said Jesse M. Chase, Inc., a corporation, is now the owner in fee simple and in possession of the following described real estate situate in Bannock County, Idaho, to wit:

Lots 6 and 7 in Block 267; North 25 feet of Lot 15 and all of Lot 16 in Block 235, and Lots 17, 18, 19 and 20 inclusive, in Block 235 all in Pocatello Townsite, Bannock County, Idaho, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General.

IV.

That the defendant, Louise B. Musselman Sisil, claims some estate, right, title or interest in and to said property adverse to plaintiff's interest; that the claim of said defendant is without any right whatsoever, and said defendant has no right, title, interest or estate whatsoever in and to said above described real property, or any part or portion thereof.

Wherefore, Plaintiff prays judgment: That the defendant, Louise B. Musselman Sisil, be required to set forth the nature of her claims, and that all adverse claims may be determined by a decree of this court; that by said decree it be declared and adjudged that plaintiff is the owner in fee simple of said premises described in said complaint, as Receiver of Jesse M. Chase, Inc.; that the defendant,

Louise B. Musselman Sisil be decreed to have no estate, right, title or interest whatsoever in and to said real property or any part thereof, and that the title of the plaintiff to said lands and premises is good and valid.

That it be further adjudged and decreed that said Louise B. Musselman Sisil, be forever enjoined and debarred from asserting any right, title, interest, claim or estate whatever in and to said lands and premises, or any part thereof, adverse to the plaintiff.

And that plaintiff have such other and further relief as to this court may seem meet and equitable in the premises, and that plaintiff recover his costs herein incurred.

BISTLINE & BISTLINE,
Attorneys for Plaintiff.

State of Idaho,
County of Bannock—ss.

Fred D. Hilliard, being first duly sworn, deposes and says: That he is the above-named plaintiff; that he has read the foregoing complaint, knows the contents thereof, and believes the facts therein stated to be true.

/s/ FRED D. HILLIARD.

Subscribed and sworn to before me this 28th day of November, 1949.

/s/ F. M. BISTLINE,
Notary Public, Pocatello,
Idaho.

[Endorsed]: Filed December 10, 1949.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant and for answer to plaintiff's amended complaint, admits, denies and alleges:

I.

This defendant admits Paragraphs I and II of said complaint.

II.

Defendant admits that the record title to the real estate described in Paragraph III of plaintiff's complaint shows Jesse M. Chase, Inc., as the owner in fee of the same, but alleges that the said corporation is not in truth and in fact, the owner of said real estate, but that the same is owned by Jesse M. Chase an individual, and if not owned by said Jesse M. Chase, is held in trust by the said corporation for the payment of the debts of Jesse M. Chase, and especially for the payment of a judgment recovered by Louise B. Musselman Sisil in the above-entitled cause in an action wherein she was plaintiff and Jesse M. Chase defendant and in which a judgment was entered in her favor in the sum of \$10,-330.73, and alleges that the real estate in said paragraph III described, is subject to the lien of said judgment.

III.

Defendant admits all of Paragraph IV of said Amended Complaint, except that defendant denies that her claim, which is adverse to the plaintiff's claim is without right, or inferior to the claim of the plaintiff and alleges that it is superior thereto.

Further Answering Said Amended Complaint and
as a Complete and Affirmative Defense Thereto,
the Defendant Alleges:

I.

That Jesse M. Chase, Inc., a corporation as referred to in plaintiff's complaint was organized by Jesse M. Chase, an individual, solely for his own benefit; that said corporation was operated by dummy directors in the employ of Jesse M. Chase and who acted under his supervision and direction; that the said Jesse M. Chase transferred all of his assets that were liable for and should have been used for the payment of this defendant's claim and judgment to said Jesse M. Chase, Inc., a corporation, without any consideration whatever except for the issuance of corporate stock and that Jesse M. Chase, for all legal intents and purposes, was the owner of all of the stock issued by said corporation; that said corporation assumed the payment of certain Investors Certificates outstanding and signed by Jesse M. Chase, an individual, and agreed to pay the same; that the defendant herein was the owner of such Investors Certificates and the judgment heretofore referred to was rendered in her favor in a suit upon such certificates; that the transfer of the property of Jesse M. Chase to said corporation was in fraud of this creditor and of creditors generally, and that said corporation was fully advised of and knew all of the facts and circumstances surrounding the purchase of Investors Certificates but this defendant and her then hus-

band, Wm. H. Musselman, and that the proceeds of said certificates and the money paid by this defendant and her then husband, went into and became a part of the assets of Jesse M. Chase, Inc., with the full knowledge of all of the officers of said corporation, which was entirely owned and controlled by Jesse M. Chase, an individual; that said corporation took and accepted the real estate described in plaintiff's complaint, as trustee for the benefit of this defendant and that defendant's judgment against Jesse M. Chase is a valid lien upon the real estate in plaintiff's complaint referred to.

Wherefore, defendant prays that plaintiff's complaint be dismissed and that this court determine and enter its decree to the effect that defendant's judgment is a valid lien upon the real estate in plaintiff's complaint described and for such other and further relief as may seem just and proper in the premises, and that defendant recover all of her costs herein incurred.

/s/ B. W. DAVIS,

Attorney for Defendant.

State of Idaho,
County of Bannock—ss.

B. W. Davis, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the defendant in the above-entitled cause; that he makes this verification for and on behalf of the defendant for the reason that she is absent from and lives outside of the

State of Idaho, the place where Affiant has his residence and office. That he is familiar and acquainted with the facts set forth in the above and foregoing answer and that the facts therein stated are true as he believes.

/s/ B. W. DAVIS.

Subscribed and sworn to before me this 12th day of December, 1949.

[Seal] /s/ LAURA S. GOUGH,
Notary Public.

Service admitted.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED
COMPLAINT

Comes now the defendant and by leave of Court granted at the close of the presentation of evidence by the parties on the trial hereof and files this, her Amended Answer and separate affirmative defense to conform to the proof submitted.

I.

This defendant admits Paragraphs I and II of said complaint.

II.

Defendant admits that the record title to the real estate described in Paragraph III of plaintiff's

complaint shows Jesse M. Chase, Inc., as the owner in fee of the same, but alleges that the said corporation is not in truth and in fact, the owner of said real estate, but that the same is owned by Jesse M. Chase an individual, and if not owned by said Jesse M. Chase, is held in trust by the said corporation for the payment of the debts of Jesse M. Chase, and especially for the payment of a judgment recovered by Louise B. Musselman Sisil in the above-entitled cause in an action wherein she was plaintiff and Jesse M. Chase defendant and in which a judgment was entered in her favor in the sum of \$10,-330.73, and alleges that the real estate in said paragraph III described, is subject to the lien of said judgment.

III.

Defendant admits all of Paragraph IV of said Amended Complaint, except that defendant denies that her claim, which is adverse to the plaintiff's claim is without right, or inferior to the claim of the plaintiff and alleges that it is superior thereto.

Further Answering Said Amended Complaint and as a Complete and Affirmative Defense Thereto, the Defendant Alleges:

I.

That Jesse M. Chase, Inc., a corporation as referred to in plaintiff's complaint was organized by Jesse M. Chase, an individual, solely for his own benefit; that said corporation was operated by dummy directors in the employ of Jesse M. Chase

and who acted under his supervision and direction that the said Jesse M. Chase transferred all of his assets that were liable for and should have been used for the payment of this defendant's claim and judgment to said Jesse M. Chase, Inc., a corporation without any consideration whatever except for the issuance of corporate stock and that Jesse M. Chase for all legal intents and purposes, was the owner of all of the stock issued by said corporation; that said corporation assumed the payment of certain Investors Certificates outstanding and signed by Jesse M. Chase, an individual, and agreed to pay the same; that the defendant herein was the owner of such Investors Certificates and the judgment heretofore referred to was rendered in her favor in a suit upon such certificates; that the transfer of the property of Jesse M. Chase to said corporation was in fraud of this creditor and of creditors generally, and that said corporation was fully advised of and knew all of the facts and circumstances surrounding the purchase of Investors certificates but this defendant and her then husband, Wm. H. Musselman, and that the proceeds of said certificates and the money paid by this defendant and her then husband, went into and became a part of the assets of Jesse M. Chase, Inc., with the full knowledge of all of the officers of said corporation, which was entirely owned and controlled by Jesse M. Chase, an individual; that said corporation took and accepted the real estate described in plaintiff's complaint, as trustee for the benefit of this defendant and that defendant's judgment against Jesse M.

Chase is a valid lien upon the real estate in plaintiff's complaint referred to.

Further Answering Said Amended Complaint and as a Second and Complete Affirmative Defense Thereto, This Defendant Alleges

I.

That the plaintiff herein, subsequent to the filing of his amended complaint and subsequent to the sale of the real estate described in plaintiff's said complaint, the U. S. Marshal selling under an execution issued on behalf of defendant herein in the case of Louise B. Musselman Sisil vs. Jesse M. Chase, on a judgment entered in the above-entitled court in case No. 1539, accepted and secured from Jesse M. Chase, a conveyance of the premises and an assignment of his right to redemption, and duly redeemed from the execution sale and is now estopped to deny the validity of this defendant's claim under said execution and is estopped to question her right or interest in and to the premises described in plaintiff's complaint.

II.

That the plaintiff herein, as receiver of Jesse M. Chase, Inc., has and can have no greater right in and to the real estate described in his complaint than the said Jesse M. Chase, Inc., had in and to said real estate by reason of a transfer to said purported corporation from Jesse M. Chase an individual; that Jesse M. Chase as President of Jesse M. Chase, Inc., had full knowledge and notice of all

matters and things in connection with Case No 1539 as heretofore referred to, pending in the above entitled court, and notice to said Jesse M. Chase was full and complete notice to said corporation in all matters and things connected therewith.

Further Answering Said Complaint and as a Counter Claim and Cross-Demand Against the Said Plaintiff, the Defendant Alleges:

I.

That the said Jesse M. Chase and Jesse M. Chase, Inc., at all times herein mentioned, were and now are one and the same person or concern. That the judgment heretofore entered in favor of Louise B. Musselman Sisil in that certain action wherein she was plaintiff and Jesse M. Chase was defendant, being case 1539 in the above-entitled court, is res adjudicata as to the plaintiff herein as Receiver of Jesse M. Chase, Inc., and as to Jesse M. Chase, Inc., and that said judgment was both in law and in fact, a judgment against Jesse M. Chase, Inc., which purported corporation held any property assigned, transferred or sold to it by Jesse M. Chase, an individual, in trust for Louise B. Musselman Sisil by reason of the fraudulent transfer thereof and by reason of the failure of the said Jesse M. Chase and Jesse M. Chase, Inc., to comply with the Bulk Sales Act of the State of Idaho.

II.

That the judgment in favor of Louise B. Musselman Sisil as aforesaid is a judgment and should be

declared to be a judgment against the assets of both Jesse M. Chase and Jesse M. Chase, Inc., and is a judgment that should be and this defendant in this cross-demand or counter claim, asks that it be declared a judgment against Jesse M. Chase, Inc., as of the date of the entry of the same, and also asks that the purported sale from Jesse M. Chase an individual to Jesse M. Chase, Inc., be held and declared to be a fraud upon Louise B. Musselman Sisil.

III.

And Louise B. Musselman Sisil alleges that she is entitled to a judgment and decree directing the said plaintiff herein to make payment of any balance due upon her judgment as aforesaid in the same manner as any and all other judgments heretofore entered against Jesse M. Chase, Inc., have been paid.

Wherefore, Defendant prays that the plaintiff's complaint be dismissed and that this court allow and enter its decree to the effect that defendant's judgment was at all times herein mentioned, a valid lien upon the real estate in plaintiff's complaint described and that this court adjudge and decree that said judgment is a valid claim and judgment as of the date thereof against any and all assets and property standing in the name of either Jesse M. Chase an individual or Jesse M. Chase, Inc., and that said judgment be declared to be in law and in fact a judgment against Jesse M. Chase, Inc., and that the said Receiver, plaintiff herein, be required to recog-

nize and pay said judgment the same as any and all other judgments against Jesse M. Chase, Inc., have been recognized and paid and defendant and cross-demandant prays for such other and further relief as may seem just and proper in the premises and that she recover all of her costs herein incurred.

B. W. DAVIS,
Attorney for Defendant.

Service admitted.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

MEMORANDUM

The defendant Louise B. Musselman Sisil, was the owner and holder of certain investment certificates signed and executed by Jesse M. Chase as an individual, issued during the year 1945. Mrs. Sisil brought an action in this Court against Jesse M. Chase on these investment certificates and on October 1, 1949, obtained judgment for \$10,330.73; on October 15, 1949, she caused to be filed a transcript of said judgment in the County Recorder's office in Bannock County, Idaho. It is by virtue of this judgment and the subsequent filing of the transcript that she claims a lien which is the subject matter of this suit.

The Plaintiff is the duly appointed Receiver of Jesse M. Chase, Inc., and seeks by this action a

decree declaring and adjudging that plaintiff is the owner in fee simple of the real estate on which levy of execution was made and that defendant has no estate, right, title or interest in the property; and further that the defendant be forever enjoined and debarred from asserting any right, title, interest, claim or estate in the property, adverse to the plaintiff.

Jesse M. Chase was engaged in the used car business; his operations were very extensive; in these operations he issued several hundred thousand dollars in investment certificates such as the certificates held by the defendant in this case. While these certificates were outstanding he transferred his entire assets and business to Jesse M. Chase, Inc. Outside of a few of his employees, which he used in order to comply with the corporation laws, he was the owner of the business. The corporation was at most, a mere alter ego of its owner. Jesse M. Chase was continuing in business, but under the name of Jesse M. Chase Inc., and from the facts that were brought to light in the evidence in this case it appears that he was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it and then was instrumental in having the corporation placed in the hands of a Receiver.

The Court is convinced that all these transactions were made for only one purpose and that was to hinder and delay this defendant and others from enforcing their claims. *Shapiro v. Wilgus et al., Receivers.* 287 U. S. 348.

The fact that the plaintiff here is the Receiver—considering the facts that lead up to his appointment, places him in no better position than if Jesse M. Chase or Jesse M. Chase, Inc., was the plaintiff and he is subject to the maxim “he who comes into equity must come with clean hands.”

The Court is of the opinion that the judgment entered for the defendant in case No. 1539 in this Court, Louise B. Musselman Sisil v. Jesse M. Chase, is a valid lien upon the real estate here involved and that she is entitled either to payment of her judgment or enforcement of her lien.

Counsel for the defendant will prepare the necessary findings of fact, conclusions of law and judgment and will serve copy on opposing counsel and submit the originals to the Court for approval.

Dated August 2, 1950.

Clark: District Judge.

[Endorsed]: Filed August 2, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having heretofore been submitted to the court without a jury by agreement of counsel for the respective parties, upon issues framed by the plaintiff's amended complaint and the amended answer to the amended complaint and the counter claim and cross-demand of the defend-

ant against the plaintiff; the said amended answer to the amended complaint and the counter claim and cross-demand having been filed by leave of court upon application made by counsel for defendant during the trial of said cause and evidence, both oral and documentary, having been submitted on behalf of plaintiff and defendant and written briefs having been prepared and filed by the respective parties, and the Court having carefully considered said briefs and evidence in said cause and having heretofore, on the 2nd day of August, 1950, made and filed its written memorandum or opinion, the Court now makes the following:

Findings of Fact

I.

That at the time of the filing of plaintiff's Amended Complaint, the said Fred D. Hilliard was the duly appointed, qualified and acting receiver of Jesse M. Chase, Inc., a corporation by virtue of an order of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County in an action entitled "J. A. Youngren, plaintiff vs. Jesse M. Chase, Inc., a corporation," made on the 5th day of November, 1949; that the said Receiver filed his oath of office and gave bond as required by order of appointment; that thereafter Donald Burnett was appointed Receiver in place and instead of the said Fred D. Hilliard and is now the duly appointed and qualified and acting Receiver of Jesse M. Chase, Inc., a corporation.

II.

That at the time of the commencement of plaintiff's action, and prior thereto, Jesse M. Chase, Inc., was a corporation organized and existing under and by virtue of the laws of the State of Idaho with its principal place of business at Pocatello, Bannock County, Idaho.

III.

That at the time of the appointment of a receiver for Jesse M. Chase, Inc., a corporation, the records in the office of the County Recorder of Bannock County, Idaho, showed said corporation to be the record title owner of the following described real estate, to wit:

Lots 6 and 7 in Block 267, North 25' of Lot 15 and all of Lot 16 in Block 235, Lots 17, 18, 19 and 20 inclusive in Block 235, all in Pocatello Townsite, Bannock County, Idaho, according to the Official Plat of the Survey of said lands returned to the General Land Office by the Surveyor General;

That the said corporation derived any title to said real estate from and by virtue of a warranty deed executed by Jesse M. Chase and wife, conveying said real estate to said corporation; that said deed was without any consideration and was in fraud of the rights of Louise B. Musselman Sisil, the defendant and cross-demandant herein.

IV.

That the transfer or attempted transfer by Jesse M. Chase and wife to the said Jesse M. Chase, Inc.,

a corporation, of the real estate hereinbefore and in plaintiff's amended complaint described, was without any consideration and was ineffectual insofar as the rights of the said defendant were and are concerned and that the said real estate and the proceeds from any sale thereof, or the proceeds of any moneys held in trust by reason of any sale of said real estate, was and is held in trust for the payment of a certain judgment received by Louise B. Musselman Sisil in an action entitled: "In the District Court of the United States in and for the District of Idaho, Eastern Division, Louise B. Musselman Sisil, plaintiff and Jesse M. Chase, defendant, Case No. 1539," in which judgment was entered in favor of the said Louise B. Musselman Sisil in the amount of \$10,330.73, said judgment having been entered on the 1st day of October, 1949, and prior to the appointment of a Receiver for Jesse M. Chase, Inc., a corporation.

V.

That at the time of the incorporation of Jesse M. Chase, Inc., Jesse M. Chase, an individual was indebted to the defendant and her then husband, upon certain promissory notes or Investment Certificates which were reduced to judgment by the defendant in case No. 1539 as hereinabove referred to; that the said corporation was organized solely for the benefit of the said Jesse M. Chase; that he was, for all practical purposes the sole and only owner of all of the corporate stock of said corporation, having used the names of a few of his employees in the incorporation of Jesse M. Chase, Inc., solely in

order to comply with the corporation laws of the State of Idaho and there was no consideration for the transfer of the assets of Jesse M. Chase, an individual to Jesse M. Chase, Inc., a corporation, and that insofar as the rights of Jesse M. Chase, Inc., and of the defendant herein were concerned, the said Jesse M. Chase remained the owner of the assets transferred to Jesse M. Chase, Inc., and the said corporation held the assets in trust for the payment of the defendant's claim.

VI.

That at the time of the incorporation of Jesse M. Chase, Inc., the said corporation expressly assumed the payment of the "Investors Certificates" then outstanding and signed by Jesse M. Chase, an individual and agreed to pay the same; that the defendant herein and her now deceased husband, at the time of said incorporation and at the time of the issuance of the corporate stock to Jesse M. Chase, an individual and at the time of the assumption by the corporation of the payment of said "Investors Certificates," was the owner of certain "Investors Certificates" as reduced to judgment in Case No. 1539; that the transfer of all of the assets of Jesse M. Chase used in and about the used car business operated by him, to said corporation in exchange for corporate stock, issued to said Jesse M. Chase, was a fraud upon the defendant herein, and that said corporation, of which Jesse M. Chase was the president, manager and sole director, was fully advised and knew all of the facts and circumstances sur-

rounding the purchase of "Investors Certificates" by the defendant, Louise B. Musselman Sisil and her then husband, William H. Musselman and that the said corporation knew that the proceeds received by Jesse M. Chase from the sale of said "Investors Certificates" to the defendant and her then husband, had come into and become a part of the assets of Jesse M. Chase, Inc.; that said Jesse M. Chase, Inc., took and accepted the real estate described in plaintiff's Amended Complaint and all of the assets, real and personal, transferred to it by Jesse M. Chase, an individual as Trustee for the benefit of this defendant, and that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry, was and is a valid lien upon the real estate in plaintiff's amended complaint referred to.

VII.

That the said Jesse M. Chase, an individual was the moving party in the appointment of a receiver for Jesse M. Chase, Inc., a corporation; that he actively participated in securing the appointment of a receiver, appeared by counsel in the District Court of Bannock County, in and for the Fifth Judicial District of the State of Idaho, urging the appointment of a Receiver for said corporation; that the corporation did not file any answer or denial to the allegations in the complaint of J. A. Youngren, asking for a Receiver and that a Receiver was desired by the said Jesse M. Chase for the purpose of placing the assets of the said Jesse M. Chase trans-

ferred to said corporation out of reach of defendant herein.

VIII.

That the said Jesse M. Chase, at the time of the transfer of all of the assets, both personal and real, of his used car business to Jesse M. Chase, Inc., gave no notice of said transfer to the defendant herein as a creditor, and made no attempt or effort to comply with the Bulk Sales Act of the State of Idaho.

IX.

That the judgment heretofore rendered in favor of Louise B. Musselman Sisil in case No. 1539 as afore-mentioned, at the time of its entry and rendition, was in fact, a judgment against the assets of both Jesse M. Chase and Jesse M. Chase, Inc., as of the date of the sale thereof.

X.

That the said plaintiff herein, the Receiver of Jesse M. Chase, Inc., took over and accepted the real estate described in plaintiff's amended complaint, and took over and accepted any and all other assets of the said corporation, subject to the judgment of Louise B. Musselman Sisil, and against Jesse M. Chase, an individual as aforesaid, and that Louise B. Musselman Sisil is entitled to a judgment and decree directing the plaintiff to make payment of any balance due upon her judgment as aforesaid, in the same manner as any and all other judgments entered against Jesse M. Chase, Inc., have been paid by said Receiver.

XI.

That the defendant, Louise B. Musselman Sisil, on the 15th day of October, 1949, caused to be filed and recorded with the County Recorder of Bannock County, Idaho, an abstract of judgment from the U. S. District Court for the District of Idaho, showing the entry of a certain judgment in favor of Louise B. Musselman Sisil as judgment creditor against Jesse M. Chase, judgment debtor, on the 1st day of October, 1949, in the amount of \$10,-307.13 principal and costs in the amount of \$23.60 as appeared in Volume 4 at Page 453 in Case No. 1539 on the Judgment Docket of said Federal Court; that upon the filing and recording of said abstract of Judgment, the same became and was a lien upon all of the assets of Jesse M. Chase, Inc., a corporation in accordance with the laws of the State of Idaho.

XII.

That the plaintiff herein, subsequent to the rendition and entry of the judgment in favor of Louise B. Musselman Sisil and against Jesse M. Chase in Case 1539 as aforesaid and subsequent to the filing and recording of an abstract of said judgment in the office of the County Recorder of Bannock County, Idaho, sold the real estate described in plaintiff's amended complaint.

Conclusions of Law

I.

That the plaintiff has failed to prove and establish the material allegations of his Amended Complaint

and is not entitled to any judgment against the defendant.

II.

That the defendant has established and proven the material allegations of her Answer and Cross-Demand and is entitled to judgment as prayed for by her.

III.

That the judgment and claim of the defendant against Jesse M. Chase an individual as heretofore referred to in the Findings of Fact and as set forth in the pleadings of the parties, is a valid claim against the plaintiff as Receiver of Jesse M. Chase, Inc., and that the right, title and interest of the defendant as claimed by her, in, to and against the real estate described in Paragraph III of Plaintiff's Amended Complaint is superior to the right of the said plaintiff as receiver and is a valid lien upon the said real estate.

IV.

That all of the assets, real and personal and the real estate described in plaintiff's amended complaint, transferred by Jesse M. Chase an individual to Jesse M. Chase, Inc., was in fraud of the rights of Louise B. Musselman Sisil and was of no legal effect insofar as her claim against Jesse M. Chase is and was concerned and that the said real estate described in said Amended Complaint and all other assets of Jesse M. Chase, Inc., received from Jesse M. Chase an individual by reason of transfer thereof, were and are held in trust by the said plaintiff herein, and by Jesse M. Chase, Inc., a corporation, for the benefit of Louise B. Musselman Sisil.

V.

That the judgment entered in that certain case entitled:

“In the District Court of the United States, in and for the District of Idaho, Eastern Division, Louise B. Musselman Sisil, Plaintiff, vs. Jesse M. Chase, Defendant, Case 1539” at the time of its entry, and ever since said time, has been a valid judgment against the real estate described in plaintiff’s amended complaint and against the assets of Jesse M. Chase, Inc., a corporation.

VI.

That the defendant and cross-demandant is entitled to a judgment directing the plaintiff herein as receiver, to pay to the defendant, the balance due upon her judgment against Jesse M. Chase out of any funds set aside or held in trust for said purpose or out of any funds received from the sale by the said plaintiff and receiver, of the real estate described in plaintiff’s amended complaint or out of the sale of any other of the assets of Jesse M. Chase, Inc., in the same manner and on the same basis as other judgments have been paid by said receiver that were recovered against Jesse M. Chase, Inc., a corporation or Jesse M. Chase.

Dated this 18th day of August, 1950.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed August 18, 1950.

In the United States District Court, for the District
of Idaho, Eastern Division

No. 1592

FRED D. HILLIARD, Receiver of JESSE M
CHASE, INC., a Corporation,
Plaintiff,

vs.

LOUISE B. MUSSELMAN SISIL,
Defendant.

JUDGMENT

The above-entitled cause having been tried and submitted to the court sitting without a jury, by agreement of counsel for the respective parties upon the issues framed by plaintiff's Amended Complaint and the Amended Answer of the defendant to said Amended Complaint and the Cross-Demand of the defendant, the plaintiff appearing in person and by his counsel, F. M. Bistline, and the defendant appearing in person and by her counsel, B. W. Davis, and plaintiff and defendant having introduced evidence, both oral and documentary, and the court having taken the matter under advisement and having carefully considered the evidence and the written briefs submitted by the respective parties in support of their contentions and the court having heretofore filed and entered a written opinion and made and filed Findings of Fact and Conclusions of Law:

It Is Ordered, Adjudged and Decreed that the plaintiff take nothing by reason of his complaint and that the judgment of Louise B. Musselman Sisil, in the amount of \$10,330.73, or any balance due thereon, the same being that certain judgment made and entered in the Federal District Court of the United States in and for the District of Idaho, Eastern Division in that certain case in which Louise B. Musselman Sisil was plaintiff and Jesse M. Chase, defendant, being Case 1539, said judgment having been signed on the 1st day of October, 1949, is a valid judgment and a lien upon the following described real estate:

Lots 6 and 7 in Block 267, North 25' of Lot 15 and all of Lot 16 in Block 235, Lots 17, 18, 19 and 20 inclusive in Block 235, all in Pocatello Townsite, Bannock County, Idaho, according to the Official Plat of the Survey of said Lands returned to the General Land Office by the Surveyor General,

and that the defendant is entitled either to the payment of her said judgment or an enforcement of her lien as against said real estate.

It Is Further Ordered, Adjudged and Decreed that the defendant herein, having filed a counter claim or cross-demand against the plaintiff, that she is entitled to judgment in accordance with said Cross-Demand that the plaintiff herein or the receiver of Jesse M. Chase, Inc., should be compelled and is hereby ordered to satisfy the judgment

of Louise B. Musselman Sisil as hereinabove referred to, in the same manner as any and all other judgments have been paid and satisfied by him, whether the same have been judgments against Jesse M. Chase, Inc., or Jesse M. Chase, an individual, and

It is Further Ordered, Adjudged and Decreed, that the judgment of Louise B. Musselman Sisil in Case 1539 as aforesaid, is a valid judgment against any and all funds received by said Receiver from the sale of the real estate heretofore described and is a judgment against any funds held in trust by the Receiver or others for the purpose of protecting the title to the said real estate as against the lien or claim of Louise B. Musselman Sisil.

That the Judgment entered in favor of Louise B. Musselman Sisil against Jesse M. Chase in Case 1539 in the United States District Court of the District of Idaho, Eastern Division as shown by an Abstract and Transcript of the same filed in the office of the County Recorder of Bannock County, Idaho on October 15, 1949, when said Abstract of Judgment was filed, became a valid lien against all of the assets of Jesse M. Chase, Inc., a corporation in accordance with the laws of the State of Idaho with reference to the liens of judgment creditors, and

It Is Further Ordered, Adjudged and Decreed that the judgment entered in said case No. 1539 in favor of Louise B. Musselman Sisil and against Jesse M. Chase on the 1st day of October, 1949, in the total amount of \$10,330.73, was a judgment

against and became a judgment against Jesse M. Chase, Inc., a corporation upon the signing of the same and the said Judgment is hereby ordered and declared to be a valid judgment against all of the assets standing in the name of Jesse M. Chase, Inc., a corporation as of the 1st day of October, 1949.

It Is Further Ordered that the defendant recover her costs herein expended, to be taxed by the Clerk in the sum of \$64.10.

Dated this 18th day of August, 1950.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed August 18, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fred D. Hilliard, Receiver of Jesse M. Chase, Inc., a corporation, the plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 18, 1950.

/s/ F. M. BISTLINE,
/s/ R. DON BISTLINE,
Attorneys for Appellant.

[Endorsed]: Filed September 12, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The above-named plaintiff and appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Amended Complaint.
2. Answer and amendments thereto.
3. Entire Transcript of the evidence taken at the trial.
4. Memorandum Decision.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. This designation.

A Copy of the entire transcript of the evidence as referred to in number three above, and a copy of the proceedings stenographically reported, as referred to herein, will be served and filed as soon as such transcript or transcripts, are completed by the reporter.

/s/ F. M. BISTLINE,

/s/ R. DON BISTLINE,

Attorneys for Appellant.

Service Admitted.

[Endorsed]: Filed October 19, 1950.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefore,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to December 12, 1950.

Dated this 11th day of October 1950.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed October 12, 1950.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for the respective parties that all exhibits may be sent to the appellate court in lieu of copies and that the District Court may make such order therefor, and for the safekeeping, transportation and return thereof as it deems proper.

/s/ F. M. BISTLINE,

/s/ R. DON BISTLINE,

Attorneys for Plaintiff and
Appellant.

/s/ B. W. DAVIS,

Attorney for Defendant and
Respondent.

[Endorsed]: Filed November 8, 1950.

In the United States District Court, for the District
Of Idaho, Eastern Division

No. 1592

FRED D. HILLIARD, Receiver of JESSE M.
CHASE, INC., a Corporation,

Plaintiff,

vs.

LOUISE B. MUSSELMAN SISIL,

Defendant.

TRANSCRIPT OF PROCEEDINGS

This matter was tried before the Honorable Chase
A. Clark, United States District Judge, sitting with-
out a jury at Pocatello, Idaho, on May 2nd, 1950.

Appearances:

F. M. BISTLINE, Esq.,

Pocatello, Idaho,

Attorney for the Plaintiff.

BEN W. DAVIS, Esq.,

Pocatello, Idaho,

Attorney for the Defendant.

May 2nd, 1950, 10:00 o'clock A.M.

The Court: Are you Gentlemen ready to proceed?

Mr. Bistline: The Plaintiff is ready.

Mr. Davis: The Defendant is ready.

Mr. Bistline: I wonder if the Court would like
me to make a statement as to the issues here?

The Court: I think, Mr. Bistline, I am quite familiar with the issues in this matter, and I think it will be just as well to go right ahead with your testimony.

Mr. Davis: If the Court please, it might save some time—on yesterday, Mr. Bistline gave me this abstract; I have examined it and I don't want to object just to be making objections, but it may be possible that later I will want to object.

The Court: That I would suggest that in order that the matter may go in in an orderly fashion, that possibly these exhibits, whatever Mr. Bistline has to offer, should be marked and offered.

Mr. Bistline: We have had the exhibits marked, however, we will go ahead with our offers now.

The Court: Very well, you may do so.

Mr. Bistline: The Plaintiff offers in evidence Plaintiff's proposed Exhibit No. 1 which is a proofed copy, it has been proof read and certified, as the [1*] articles of incorporation of Jesse M. Chase, Incorporated, a corporation.

Mr. Davis: Have there been any amendments to those articles?

Mr. Bistline: I propose to ask Mr. Chase about that.

Mr. Davis: If something should develop in regard to this I am sure the Court would permit me to make a motion to strike or to have my objection.

The Court: I will admit this subject to your right, Mr. Davis, to make a motion to strike.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

JESSE M. CHASE

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. I believe you gave your name as Jesse M. Chase? A. Yes, sir.

Q. Will you please refer to the paper you have in your hand, which is a certified copy of the articles of incorporation of Jesse M. Chase, Incorporated, and state what position you held with that corporation? A. I am President of the corporation.

Q. How long have you been President? [2]

A. Since its organization.

Q. Has there been any amendments to the articles of incorporation since they were filed in 1947?

A. No.

Mr. Bistline: Plaintiff now offers in evidence proposed exhibit No. 2, which is a copy of an order appointing a Receiver.

Mr. Davis: Is that a correct copy, Mr. Bistline?

Mr. Bistline: Yes, it is.

Mr. Davis: Then I have no objection.

The Court: Then it may be admitted.

Mr. Bistline: Plaintiff now offers proposed exhibit No. 3, being a certified copy of a warranty deed, certified to by Anna Keefe, Clerk of the District Court and Ex-Officio Auditor and Recorder of Bannock County, Idaho; this instrument is recorded in Book 98 of Deeds at page 438 of the records of Bannock County, State of Idaho, on February 12,

(Testimony of Jesse M. Chase.)

1947, wherein Jesse M. Chase and Edith A. Chase—husband and wife—are Grantees, and Jesse M. Chase, Incorporated, is the Grantee, which describes the property involved in this action.

Mr. Davis: I have no objection to its being a certified copy, but I do object on the ground [3] that no proper foundation has been laid and by our answer we denied any consideration for the deed, or that there was any consideration; it has not as yet been established.

The Court: It may be admitted at this time subject to the objection and, of course, subject to be connected up in regard to the questions that you raised in your objection. If that is not done, of course it will be subject to your motion to strike.

Mr. Bistline: The Plaintiff at this time offers Plaintiff's proposed exhibit No. 4 which is a supplemental abstract of title to the property involved in this action, subsequent to the recording of the deed which has been admitted in evidence as exhibit No. 3.

Mr. Davis: I have no objection to this. I agreed with counsel that it was not necessary to furnish all of the abstracts and that this could be introduced, this abstract only subsequent to the time of the deed.

The Court: Then it may be admitted.

Mr. Bistline: I have no further questions.

Mr. Davis: I don't believe I have any questions of this witness at this time.

Mr. Bistline: The Plaintiff rests. [4]

Mr. Davis: I move that exhibit No. 3 offered in evidence and admitted subject to my objection be stricken at this time, the legal effect of the deed, and

(Testimony of Jesse M. Chase.)

the consideration therefor having been denied in the answer, and I move that judgment be entered for the Defendant; the Plaintiff has wholly failed to show himself entitled to any relief, he stands in the shoes of the corporation. They have put the President of the corporation on the stand and I do not feel that they have established their case. I do not feel that exhibit No. 3 is entitled to remain in evidence.

The Court: Your motion will be denied at this time, Mr. Davis.

Mr. Davis: We would like to call Mr. Burnett for cross-examination.

The Court: Very well.

DONALD L. BURNETT

being called as a witness by the Defendant, for cross-examination, after being first duly sworn, testifies as follows:

Cross-Examination

By Mr. Davis:

Q. You are the present Receiver for Jesse M. Chase, Incorporated?

A. Yes, sir, that is correct.

Q. It is your position that the judgment that was entered [5] in favor of Mrs. Sisil against Jesse M. Chase in this Court is not a judgment against the corporation, and is not a lien on any of the corporation's assets?

A. That is correct.

Q. And you in this action are representing Jesse M. Chase, Incorporated?

A. That is correct.

Mr. Bistline: I don't want to make a trivial objection, but I think his capacity is shown.

(Testimony of Donald L. Burnett.)

The Court: I think he has a right to ask these questions on his cross-examination.

Q. In February of this year, after this present action had been commenced against Mrs. Sisil you made an application in the District Court of Bannock County, Idaho, as Receiver for authority to redeem from the United States Marshal's sale under execution issued in the Federal Court?

A. That is correct.

Q. And you received an order of the District Court without any reservation authorizing you to redeem on behalf of Jesse M. Chase on that sale?

A. Yes, sir.

Q. You did redeem from that sale and paid the amount that the property had been sold for, did you not? [6]

A. That is correct.

Q. I am speaking now of the present action, the one we are trying today, this action was brought when Mr. Hilliard was Receiver?

A. That is my understanding.

Q. Are you familiar with the original files in this District Court in Bannock County?

A. I reviewed it in a summary form, however, I am not familiar to the extent that Mr. Bistline is.

Q. Showing you the original Court files, the action was originally brought as "Fred D. Hilliard, Receiver, and against Mrs. Sisil and Everett M. Evans, United States Marshal"?

A. That appears to be correct.

Q. It was brought for the purpose of restraining

(Testimony of Donald L. Burnett.)

the United States Marshal from proceeding with the sale? A. I believe that is correct.

Q. And the matter was tried in the District Court, and the District Judge refused to enjoin Mr. Evans, the United States Marshal, from the sale?

A. That is correct.

Q. Your counsel amended that action, or filed an amended complaint dropping Mr. Evans, the Marshal from it and filed an amended complaint and served it on Mrs. Sisil, and that is the action we are trying now? [7] A. That is correct.

Q. You, as Receiver, under order took over all of the assets of Jesse M. Chase, Incorporated?

A. That is correct.

Q. You do not have the ledger sheets for 1947, when Mr. Chase formed this corporation?

A. What do you refer to?

Q. Do you have any ledger sheets or books showing the assets of the corporation in 1947, when it was organized? A. Yes, sir.

Q. Where are those?

A. We have an exhibit, I refer to it not in a legal sense, we have the financial statement of the corporation as of December 1st, 1946, the corporation was formed on January 1st, 1947.

Q. That is the financial statement of Jesse M. Chase individually? A. That is correct.

Q. And the assets of Jesse M. Chase individually were transferred to Jesse M. Chase, Incorporated, about the first of January?

(Testimony of Donald L. Burnett.)

A. That is correct.

Q. And Mr. Chase received for that corporate stock? A. That is correct. [8]

Q. You are familiar with the book of corporate stock? A. I have reviewed it.

Q. It is a fact is it not that there never were but five stockholders—holders of common stock in the corporation?

A. I would have to refer to the book for information on that, I cannot recall from memory.

Q. Could you recall from the corporate stock book?

A. Do you have the other file that I furnished you?

Q. Yes. A. That appears to be correct.

Q. Yes, there were five, they were Jesse M. Chase, W. R. Hubble, I. H. Nelson, W. G. Ash, and N. M. Anderson? A. That is correct.

Q. When you took possession as Receiver there were 1759 shares of the common stock of the corporation outstanding? A. Yes, sir.

Q. And 1716 of those shares belonged to Jesse M. Chase? A. That is what the record reflects.

Q. And 21 shares to W. R. Hubble?

A. Yes.

Q. You know that he was the General Manager for Jesse M. Chase? A. I was informed.

Q. You know that W. R. Hubble was in the employ of Jesse M. [9] Chase prior to this corporation being formed? A. I was informed.

Q. And you know that Mr. Nelson was the book-keeper for Jesse M. Chase at the time this corpora-

(Testimony of Donald L. Burnett.)

tion was formed? A. I was so informed.

Q. And you know that Mr. Ash was the general manager for Jesse M. Chase at the time the corporation was formed?

A. I am not familiar with those details.

Q. As to N. M. Anderson, you are familiar with the fact that he was an employe of Jesse M. Chase at the time of the forming of the corporation?

A. I don't know about Mr. Anderson.

Q. This stock book of the corporate stock shows that Mr. Chase at different times had issued to himself more shares of stock than he now holds?

A. I would have to review the record, I don't recall that from memory.

Q. Do the records indicate that Mr. Chase sold back some corporate stock?

A. I haven't reviewed the records to ascertain that.

Q. You know that the records show that Mr. Chase had more stock in this corporation from time to time than when you took it over?

A. I haven't gone over it to find that out. [10]

Q. Do you know whether the records show that he sold stock back?

A. My records as Receiver wouldn't show that; this would be a matter that I am not familiar with necessarily.

Q. The corporation was formed in 1947 and you took it over in 1949? A. December 21st, 1949.

Q. The Receiver was appointed on November 5th, 1949? A. That is right.

(Testimony of Donald L. Burnett.)

Q. You don't know how much stock he ever had in it?

A. I cannot state from memory, no.

Q. From your examination of the records—I call your attention to stock certificate No. 19, that shows issued to Jesse M. Chase 19 shares and cancelled, can you explain that?

A. That took place prior to the appointment of a Receiver and I had no occasion to review that transaction.

Q. And that would be true of the different ones issued which show they are cancelled?

A. That is correct, the duty of the Receiver didn't require a review of the capital stock in prior years.

Mr. Davis: We offer in evidence Defendant's exhibit No. 5, being the corporate stock certificate book of the corporation. [11]

Mr. Bistline: I have no objection.

The Court: It may be admitted.

Q. Now, Mr. Burnett, do you know at the time Mr. Hilliard was originally appointed as Receiver that a notice of sale and publication of the notice of sale of the real estate here in question had already been made by the United States Marshal?

A. I was advised that there had been a United States Marshal's sale as it is commonly referred to.

Q. I am calling your attention to what is Exhibit "A" of your file, are you familiar with that?

A. Yes, sir.

Q. That exhibit contains a statement of the cor-

(Testimony of Donald L. Burnett.)

porate affairs as made up by Jesse M. Chase and given to Mr. Hilliard as Receiver?

A. That is my understanding.

Q. You have gone over it?

A. I am familiar with it.

Q. Then you know, do you not, that not only Mr. Chase as President but you as Receiver have always understood and always acknowledged that all investment certificates that he sold or issued prior to the incorporation of Jesse M. Chase, Incorporated, are valid claims against the corporation? [12]

A. It is my understanding that the corporation assumed liability for all outstanding liabilities at the time the corporation was formed.

Q. Such records as you have show that to be a fact?

A. That is what I stated, it was the intention of the corporation to assume all of the liabilities of the business formerly conducted by Jesse M. Chase as an individual.

Q. And you recognize that, and recognize that Mrs. Sisil has a valid claim against the corporation?

A. No, sir, I do not.

Q. You do not recognize that her judgment is a valid claim against the corporation?

A. Not as a judgment.

Q. You recognize that it is a claim?

A. I have been informed that she has a judgment against Jesse M. Chase as an individual; that she is a holder of a certificate.

Q. And that her judgment is on that certificate?

(Testimony of Donald L. Burnett.)

A. And that she has a certificate against Jesse M. Chase.

Q. You are aware of the fact that the corporation assumed liability of all these certificates?

A. For all outstanding liabilities.

Q. And that was an outstanding liability?

A. That is a matter of dispute and perhaps for some litigation [13] as to whether they are liabilities—all of the certificates—I am not aware of what they are.

Q. In this report of Jesse M. Chase, this exhibit "A" that you refer to, he lists the different certificate holders whose certificates were signed by Jesse M. Chase, individually, as being bona fide creditors of Jesse M. Chase, Incorporated?

A. They were so listed.

Q. And he listed in this statement the claim of Louise B. Musselman Sisil as having a judgment in the United States District Court, and listed that as a claim?

A. This particular sheet does not reflect any acknowledgment of liability, it reflects legal difficulties which are subject to litigation, and in no way recognizes the judgment but simply indicates that they are included in the list, there are difficulties there, matters subject to litigation but it does not recognize the correctness of them.

Q. You want that answer to stand?

A. That is my understanding, that it is a list of legal difficulties.

Q. He listed as one of the obligations a judgment

(Testimony of Donald L. Burnett.)

of the Intermountain Credit Association of some nine hundred and forty-four dollars?

A. That was a judgment against Jesse M. Chase, Inc. [14]

Q. He listed it under the same heading as he listed the Sisil judgment,—it is in the same class as the Louise B. Musselman Sisil judgment?

A. It is not. You refer to it as the same class, it is not in the same class except that it is a legal difficulty. It in no way says that it is the same type of judgment creditor. This is a list of legal difficulties we are referring to for consideration.

The Court: Let me see that, where does it say that,—I cannot find it, it does not say that.

Q. You paid a judgment listed in favor of the Intermountain Credit Men?

Mr. Bistline: We object to that as repetition.

The Court: He can ask these questions of this witness; it may be repetition but he must answer the questions.

Q. You paid that judgment?

A. That is a judgment against Jesse M. Chase, Inc.

Q. You paid other items that are listed in there, did you not?

A. There is a judgment of C. J. McAllister, which I recall payment of.

Mr. Davis: Now, Mr. Bistline, I believe you have a copy of the Receiver's report that was attached?

Mr. Bistline: Yes. [15]

(Testimony of Donald L. Burnett.)

Mr. Davis: We ask that this be marked; we now offer in evidence Defendant's exhibit No. 6 and exhibit No. 7,—Exhibit No. 7 is a report Mr. Hilliard as Receiver to which he attached Exhibit "A", which is now Exhibit No. 6.

Mr. Bistline: We have no objection to those.

The Court: They may be admitted.

Q. You mailed to Mrs. Sisil a blank form of claim to be filed with you as Receiver of Jesse M. Chase, Incorporated? A. That is correct.

Q. Why did you mail that if she was not a creditor of Jesse M. Chase, Incorporated?

A. I am trying to answer that. That is in the nature of an investment certificate and they were reflected on the financial statement as liabilities of the corporation, and we therefore mailed these blanks to all of those persons who were known or claimed to be or could have been considered as creditors of the corporation so that they would have an opportunity to file claims.

Q. So that the Receiver recognized first, and you recognize now Louise B. Musselman Sisil as a holder of an investor's certificate or certificates signed by Jesse M. Chase, and recognize her as a creditor of the corporation? [16]

A. We mailed blanks.

Q. And you admit that she is a creditor of the corporation as a holder of the certificates?

A. She is a holder of certificates.

Q. Was she a creditor,—did they owe it to her?

A. That is a difficult question.

(Testimony of Donald L. Burnett.)

Q. They assumed liability and agreed to pay it?

A. It is listed as a liability and they assumed the liabilities as you know, there is litigation which I am not competent to testify about. It is definitely a legal question.

The Court: Did they list it as a liability of the corporation? A. Yes sir.

Q. It is your position that after she put it into judgment she ceased to be a creditor?

A. My position is that the judgment is against Jesse M. Chase individually.

Q. Your record also shows that Jesse M. Chase formed the Jesse M. Chase, Incorporated, of Colorado? A. Yes sir.

Q. And your record also shows that Jesse M. Chase formed the corporation of Jesse M. Chase of Wyoming, Inc.? A. That is correct.

Q. And your record also shows that Jesse M. Chase formed the [17] Jesse M. Chase Casper Company, Incorporated? A. Yes sir.

Q. In addition to the Jesse M. Chase of Pocatello, Incorporated; just before the Receiver was appointed he formed the Jesse M. Chase of Pocatello, Incorporated? A. Yes sir.

Q. And also Jesse M. Chase, Incorporated, those two separate corporations? A. Yes sir.

Q. And then he had the Automotive Sales, Incorporated? A. Yes sir.

Q. And Jesse M. Chase had control of those corporations?

A. I am not aware of whether he had the con-

(Testimony of Donald L. Burnett.)

strolling interests; as to those years, I have never had occasion to refer to the stock ownership, or as to how the stock ownership lay.

Q. His report shows Jesse M. Chase as a holding corporation, holding stock in all of those different corporations?

A. I presume that is correct.

Mr. Davis: If the Court please, I am not exactly familiar as to how this Court handles its own files, but I would like to have introduced the record; at any rate, a part of the record as the cross-examination or as a part of the cross-examination of this witness [18] as receiver,—I want to introduce from the case of “*Louise B. Musselman Sisil, Plaintiff vs. Jesse M. Chase*,” No. 1539, the certificate of redemption issued by the United States Marshal to Donald L. Burnett, as Receiver of Jesse M. Chase, Incorporated, showing this Receiver as Receiver redeemed for the corporation the particular lots herein question. Should I have that deemed as marked?

Mr. Bistline: I would like to call attention to the fact that the certificate is included in the abstract of title which we offered.

The Court: We will take a short recess at this time,—we will be in recess for fifteen minutes.

May 2nd, 1950. 11:00 o'clock A. M.

Mr. Davis: I believe that the abstract does sufficiently show this.

The Court: Very well, you may proceed.

(Testimony of Donald L. Burnett.)

Q. You are a Certified Public Accountant?

A. That is correct.

Q. In your opinion as Receiver, is the Jesse M. Chase, Incorporated, a corporation, insolvent?

Mr. Bistline: We object to that, it calls for an unwarranted conclusion of the witness, and to give an opinion it would be necessary to have before [19] the Court all of the assets of the corporation and the liabilities to establish this, and it would be necessary to establish whether the liabilities claimed were or may be actually liabilities.

The Court: You might, if you desire, lay the foundation as to his knowledge as to the assets and the liabilities.

Q. Of course, I am asking this for the purpose,—you have had before you what I introduced as Exhibit Nos. 6 and 7, do you agree with Mr. Chase's statement that it is necessary to have a Receiver to regulate the affairs of Jesse M. Chase, Incorporated; do you think it was necessary?

A. In my opinion it was.

Q. You, of course, in the liquidation or the process of the liquidation of this corporation have gone over its assets and liabilities thoroughly?

A. Yes sir.

Q. And you are familiar with the assets and the liabilities generally of the corporation?

A. I am.

Q. In your opinion is that corporation insolvent?

Mr. Bistline: I renew the objection, the test is

(Testimony of Donald L. Burnett.)

whether the liabilities exceed the assets. I object to this as being immaterial at this time. [20]

The Court: This witness is an expert, and I think I will let him answer.

A. If I as Receiver am ultimately ordered to recognize all the investment certificates as liabilities and their holders as creditors, to share and share alike, then it is insolvent. If they were not recognized as creditors but holders of preferred stock, that would change the picture.

Q. You just stated a while ago that you did recognize all the investment certificate holders of Jesse M. Chase as creditors of Jesse M. Chase, Incorporated?

Mr. Bistline: I believe the witness answered that he recognized that the certificates were liabilities of the corporation, there is common stock and also preferred stock,—

Mr. Davis: —If it is counsel's position that Jesse M. Chase isn't legally liable for the investment certificate,—

Mr. Bistline: —No, we go further, we agree that he is liable for all of the common stock.

A. This is a very difficult thing to answer.

The Court: Well, Mr. Witness, if you can answer that,—I think it could be stipulated that they are liabilities of the corporation because the evidence [21] now shows that they assumed all of the obligations that Jesse M. Chase had; can it be understood that at the time the transfer was made that Jesse M. Chase, Incorporated, assumed all the indebtedness of Jesse M. Chase, personally?

(Testimony of Donald L. Burnett.)

Mr. Bistline: Yes, that can be stipulated.

The Court: If that is stipulated I think that is all that is necessary.

Mr. Bistline: There is one limitation, I think,—

The Court: —I understand from the witness that he has indicated there may be some litigation over these investment certificates, the Court takes judicial notice of the fact that there was litigation in this court, and the Court made a decision. The Court held that it was a liability and that it had to be paid with certain limitations; if this Court happened to be right, then all of these other certificates may be in the same position. This witness has testified and it is now stipulated that the obligations of Jesse M. Chase included these different certificates, and they were liabilities, and assumed at the time of the transfer, is that correct?

Mr. Bistline: That is agreed based on the financial report. [22]

The Court: Whether there is a report of the obligations of Jesse M. Chase being assumed by Jesse M. Chase, Incorporated.

Mr. Bistline: In connection with the business,—

The Court: —In connection with everything, the obligation of Jesse M. Chase while he was operating or he transferred to the corporation, which is the Plaintiff in this case; when he transferred the understanding was that he assumed the obligation.

(Testimony of Donald L. Burnett.)

Mr. Bistline: That is not entirely correct; they assumed the obligation as revealed by the balance sheet.

The Court: But at that time there was no obligation of the corporation.

Mr. Bistline: As revealed there Mr. Chase's individually,—the corporation assumed that as a part of the transfer.

The Court: This claim was included in that balance sheet.

Mr. Bistline: That is there, yes.

The Court: Then it seems that is all there is to it.

Q. Mr. Burnett, in your opinion, is there any probability of any common stockholder ever receiving anything as a [23] stockholder in the liquidation of Jesse M. Chase, Incorporated?

A. Not in my opinion, there is no probability of them receiving any distribution.

Q. And that is true of the preferred stock?

A. That is correct.

Mr. Davis: I think that is all.

Redirect Examination

By Mr. Bistline:

Q. Mr. Burnett, you have testified here with regard to stockholders of common stock, are you familiar with the preferred stock holdings?

A. I have reviewed them.

Q. Have you looked over the stock book?

A. Yes sir.

Q. Handing you Exhibit No. 8, I will ask you

(Testimony of Donald L. Burnett.)

to state whether or not that is the stock book of Jesse M. Chase, Incorporated, preferred stock?

A. Yes sir.

Mr. Bistline: We offer it in evidence.

Mr. Davis: And I object to it as incompetent and irrelevant for the reason that the certificate book that he holds there will show that such preferred stock as was issued was issued subsequent to the time that the corporation assumed all of the indebtedness [24] of Jesse M. Chase, individually; subsequent to the time that it assumed payment of the certificate of Mrs. Sisil upon which the judgment is based. Furthermore, that none of the stock holders are parties to this action. The Receiver stands in the shoes of the corporation and it is immaterial here for any purpose.

Mr. Bistline: This is to determine whether a judgment executed in 1949 is controlling, or the filing date of the judgment,—

The Court: —I think the controlling date is the date when the transfer was made to the corporation by Jesse M. Chase, and the obligations pending at that time. I will admit this subject to the objection made with the understanding that the Court can strike it if it is subject, in the court's opinion, to be stricken.

Q. Does the report which was received as Defendant's Exhibit No. 6 give a resume or summary of the preferred stock holdings as of the date of the report? A. It does.

(Testimony of Donald L. Burnett.)

Q. Will you refer to the report and state how many preferred stockholders there were?

A. Fourteen.

Q. How many shares of preferred stock was outstanding? A. 278. [25]

Mr. Bistline: At this time the Plaintiff desires to have marked as an exhibit the minutes of a meeting of the stockholders held on the 15th day of January, 1947, of Jesse M. Chase, Incorporated, a corporation. We have prepared a copy of these minutes,—not a certified copy, but we do have a prepared copy which I suggest, if agreeable to counsel, that it be marked.

Mr. Davis: That part is all right, it may be marked.

The Court: Have it marked for identification and submit it to counsel.

Mr. Bistline: At this time Plaintiff offers in evidence Plaintiff's Exhibit No. 9, which is a copy of the minutes of the meeting previously referred it.

Mr. Davis: I realize that this is a matter before the Court and this is probably going in as evidence; they have not identified these minutes or who kept them. Mr. Burnett probably does not know. I will not object to the introduction if I may have the right to examine Mr. Chase or anybody else with reference to this minute book.

Mr. Bistline: We have no objection to that procedure.

The Court: They may be admitted. [26]

(Testimony of Donald L. Burnett.)

Mr. Bistline: At this time Plaintiff offers Exhibit No. 10, which is a copy of the minutes of a special meeting of the board of directors of Jesse M. Chase, Incorporated, held on the 25th day of February, 1947, containing the offer of Jesse M. Chase to the corporation, to the transfer of the assets of the consideration of the issuance of stock and so forth. We offer it in lieu of the original in the book subject to being checked.

The Court: They may be admitted with that understanding.

Mr. Bistline: At this time the Plaintiff offers in evidence Plaintiff's proposed exhibit No. 11 which is a financial statement of the Jesse M. Chase enterprises as of December 31, 1946, which is referred to in the minutes of the board of directors, being plaintiff's exhibit No. 10.

The Court: It may be admitted.

Q. Mr. Davis examined you with reference to the redemption from the sale held under the judgment of Louise B. Musselman Sisel vs. Jesse M. Chase and you in effect as Receiver stated the circumstances surrounding that redemption?

Mr. Davis: Now we object to this, the redemption and the facts recited in the instrument [27] itself would be the best evidence.

The Court: The objection is sustained.

Mr. Bistline: That is all.

Mr. Davis: That is all.

I. H. NELSON

Being called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. You live at Pocatello? A. Yes.

Q. And your occupation or business?

A. Public Accountant.

Q. You formally worked for Jesse M. Chase, individually? A. Yes sir.

Q. How long did you work for Jesse M. Chase as an individual?

A. From March 16th, 1946, until December 31st, 1946.

Q. And what were your duties,—say on the 31st of December, 1946, what were you doing?

A. I was an Accountant employed to work on the books for Mr. Chase as an individual.

Q. You were one of the original incorporators of Jesse M. Chase, Incorporated?

A. I was. [28]

Q. Did you subscribe for one share of stock?

A. Yes, I did.

Q. Do you know the other two men that subscribed for shares of stock?

A. Jesse M. Chase and W. R. Hubble.

Q. Did each of you pay for one share of stock?

A. We did.

Q. The cash of \$300.00 for one share of stock got into the assets of the corporation?

(Testimony of I. H. Nelson.)

A. Yes sir, deposited in the corporation bank account.

Q. Was any of the other stock issued paid for in cash, any other common stock issued?

A. I do not believe so.

Q. Before this corporation was formed, or at the time you signed the proposed articles of incorporation the matter was discussed by Mr. Chase, Mr. Hubble and you?

A. Yes, it had been talked over.

Q. And you as an incorporator and an employe at that time, were you personally aware of the fact that not only Mrs. Musselman or Mrs. Sisil's certificates were outstanding and unpaid, but that there were others outstanding and unpaid?

A. Yes, indeed.

Q. And the other incorporators knew that?

A. Yes sir. [29]

Q. What was your understanding upon the formation of the corporation as to whether your stock was subject to, or whether it was burdened with the payment of all of the obligations of Jesse M. Chase?

A. All of these obligations were listed in a statement of liabilities.

Q. And you knew that they were liabilities against the corporation, that the stockholders took their stock subject to the payment of those liabilities? A. Yes.

Q. Who was Mr. Ash who was also a stockholder?

(Testimony of I. H. Nelson.)

A. Mr. Ash was at one time General Manager for Jesse M. Chase; at the time of the corporation, he was a store manager in California.

Q. And Mr. Anderson, who was he?

A. At the time of the incorporation he was not an employe of the company or connected with it.

Q. Who was he?

A. He was an employe of a finance company in Denver.

Q. What finance company was that,—was Mr. Chase connected with that? A. No sir.

Q. When did Mr. Anderson come here?

A. It was after the incorporation that he came as an employe.

Q. And he received one share of stock?

A. Yes sir. [30]

Q. He never paid any cash for it, did he?

A. I think it was charged to his account.

Q. Do you know or not,—strike that,—do you know the amount the corporation was incorporated for, was it a million five hundred thousand?

A. I think that was.

Q. Five hundred thousand common stock and a million preferred stock?

A. I think that is right.

Q. And Lee C. Bloxham, was he an employe of Jesse M. Chase? A. Yes sir.

Q. He was at the time the corporation was formed? A. Yes sir.

Q. D. M. Weiler, was he an employe of the corporation or Jesse M. Chase?

(Testimony of I. H. Nelson.)

A. I believe he was employed by a separate corporation, Jesse M. Chase Incorporated of Wyoming.

Q. One of the corporations that Mr. Chase was interested in? A. Yes sir.

Q. And Bryon S. Dee, who was he?

A. He was not connected with the corporation.

Q. And D. L. Edlefesen?

A. He was an employe of Jesse M. Chase.

Q. Crane and Heider?

A. They were Accountants for the corporation, yes. [31]

Q. And W. T. Ingram?

A. He was an employe at Boise.

Q. And George W. Puw?

A. He was an employe.

Mr. Davis: I believe that is all.

Cross-Examination

By Mr. Bistline:

Q. Have you subsequently acquired any additional stock other than the one share you took?

A. No sir.

Q. That is all you have?

A. That is all I have.

Mr. Bistline: That is all.

Mr. Davis: That is all.

JESSE M. CHASE

called as a witness by the Defendant for cross-examination, having heretofore been duly sworn, testifies as follows:

Cross-Examination

By Mr. Davis:

Mr. Bistline: I think if he is being called, that he should be called as their witness for direct examination.

Mr. Davis: I don't think so, he was the [32] President of this corporation.

The Court: You may go ahead, Mr. Davis.

Q. You testified as a witness in District Court in November of 1949, the District Court of Bannock County, in support of a petition or application of Mr. Youngren for the appointment for a Receiver for Jesse M. Chase, Incorporated, did you not?

Mr. Bistline: He can testify as to whether or not he testified as a witness, but the balance I object to as irrelevant, incompetent and immaterial, and a conclusion.

Q. You were a witness on the matter of the petition for the appointment of a Receiver for Jesse M. Chase, Incorporated? A. Yes sir.

Q. Did you testify that Jesse M. Chase was absolutely insolvent and could not pay its debts?

A. I did not.

Q. Did you testify that the corporation was insolvent? A. I did not.

Q. Did you testify that Jesse M. Chase indi-

(Testimony of Jesse M. Chase.)

vidually was insolvent and couldn't pay his debts"

A. I did not.

Q. Did you testify that Jesse M. Chase had nothing as an individual and could not pay anything?

A. I don't follow that question. [33]

Q. Did you testify when you were asked if you had any assets with which you pay any investment certificate holders, that you couldn't and didn't have anything?

A. I was not asked that question.

Mr. Davis: I have asked Mr. Ray D. Bistline, the Court Reporter, if he could prepare a transcript, and he said that he could not at this time as they were trying a case at American Falls, but my notes show that he testified in effect to what I have stated,—if it is material, and the Court feels that it is, I would like permission as quickly as the Court Reporter can furnish it to have the testimony and to be allowed to furnish it to the Court.

Mr. Bistline: We feel that it is immaterial. We fail to see any materiality in this.

The Court: I will say frankly that I have been trying to see the materiality of a lot of these matters. I am satisfied at this time that this was just a matter of convenience, the transferring which was done, and I feel that Jesse M. Chase was the main man in both of these businesses. It was just a matter of transferring the assets of the individual to the corporation, and he was still the corporation himself so to speak. I fail to see the materiality of

Testimony of Jesse M. Chase.)

this at the time. Mr. Chase has been called and asked these [34] questions and he has denied that he so testified.

Mr. Bistline: Of course, we want everything before the Court, and perhaps if we could get a transcript of that evidence and Mr. Chase sees it it will refresh his memory.

The Court: Then, Mr. Davis, you may supply that record.

Q. I call your attention to the minutes of the first meeting of the board of directors of Jesse M. Chase, Incorporated, being signed by you, do you recognize that as the minutes? A. I do.

Mr. Davis: I would like to read into the record a portion of those minutes:

“It was announced to the meeting that the original incorporators, namely: Jesse M. Chase, W. R. Hubble, and I. H. Nelson, have each subscribed to one share of the capital stock of the corporation of the par value of \$100.00 each, that the secretary upon payment for said certificates was instructed to issue the certificates to the said Jesse M. Chase, W. R. Hubble, and I. H. Nelson, for one share each of the capital stock of the corporation, it was announced at the meeting by Jesse M. Chase that the corporation intends and contemplates in the near future to take over the [35] assets, liabilities and good will of the business generally heretofore conducted by Jesse M. Chase as an individual in various States, namely:

(Testimony of Jesse M. Chase.)

Utah, Wyoming, Nevada, Montana, Illinois, California, Washington, Oregon, New Mexico and Nebraska, and that in anticipation of transferring said business to the corporation it is desirable that the corporation become qualified to do business in the above-named states as a foreign corporation. However, in addition to other requirements it would be necessary for the corporation to appoint a resident or statutory agent in the various states, whereupon, it was moved by I. H. Nelson and seconded by W. R. Hubble, and upon vote of the meeting unanimously carried as follows: That the statutory agent be appointed for Wyoming, Utah, Nevada, Montana, Illinois, California, Washington, Oregon, Arizona, New Mexico and Nebraska."

Q. You recognize that? A. Yes.

Q. Mr. Chase, you were active in and participated and supported the Plaintiff, Mr. Youngren, in his action in securing the appointment of a Receiver for Jesse M. Chase, Incorporated?

Mr. Bistline: Objected to as immaterial.

The Court: He may answer.

A. I did not support Mr. Youngren in the application for Receiver. [36]

Q. You were active in,—did you testify under oath that a Receiver should be appointed for Jesse M. Chase, Incorporated? A. I did.

Testimony of Jesse M. Chase.)

Q. Did you want a Receiver appointed for a solvent corporation?

A. I wanted a Receiver appointed to conserve the assets of the corporation.

Q. You want to continue to operate the corporation?

A. You are right.

Q. You testified that if a Receiver was appointed you could go ahead and borrow money and continue to operate?

A. Under the court's jurisdiction.

Q. You were active in and testified in the action in which Mr. Youngren was Plaintiff, and you sat at the table with counsel who was trying to get a Receiver appointed?

A. I was in favor of the appointment of a Receiver.

Q. You are still actively engaged in and trying to operate Jesse M. Chase, Incorporated?

A. I have nothing to do with Jesse M. Chase, Incorporated.

Q. You were mad and indicated to the Receiver and the Attorneys because of a suit filed against you by Mrs. Sisil that you were going to prevent her from recovery in this matter?

Mr. Bistline: I object to that as immaterial. I fail to see the materiality of it. [37]

The Court: He may answer.

A. No.

Q. In September, 1949, after Mrs. Sisil had received her judgment, you sent to her at Riverside, California, a statement for her to sign showing how

(Testimony of Jesse M. Chase.)

much indebtedness she claimed against Jesse M. Chase, Incorporated, did you not?

A. Not without looking at the record, I can't say.

Q. You don't know whether you wrote her or not?

A. I don't know.

Q. Did you send her that (indicating)?

A. This was,—I recognize this.

Q. Did you send it to her? A. Yes sir.

Q. Why did you send it?

A. It was sent to all of the creditors.

Q. The creditors of Jesse M. Chase, Incorporated?

A. So far as the books show.

Q. You have reference now to Defendant's Exhibit No. 12?

A. Yes sir.

Q. You understand that is what I was asking about?

A. You know what it is.

Q. You understand that is what I am asking about?

A. Yes, sir.

Mr. Davis: We offer in evidence Defendant's exhibit No. 12. [38]

Mr. Bistline: We have no objection.

The Court: It may be admitted.

Q. Now then, Mr. Chase, after January of 1947, when you incorporated, you still continued to operate a part of the time as Jesse M. Chase and a part of the time as Jesse M. Chase, Incorporated?

A. No.

Q. You did not? A. No.

Q. You still continued to use the stationery of Jesse M. Chase as an individual, and signed letters to Mrs. Sisil as Jesse M. Chase, President?

Testimony of Jesse M. Chase.)

A. Some of the old stationery might have been used.

Q. Your answer a minute ago was not correct?

A. My answer was correct.

Q. Handing you Defendant's exhibit No. 13, is that your signature to that? A. It is.

Q. Is that a letter you wrote to Mrs. Sisil?

A. Yes sir; and a copy to you.

Q. You wrote that letter of March 30th, 1949?

A. That is right.

Q. That letter shows that it is written on the letterhead of Jesse M. Chase, individual?

A. It is signed Jesse M. Chase, President. [39]

Q. What does that letterhead show?

Mr. Bistline: I think the exhibit speaks for itself.

The Court: Perhaps so, but he may answer.

A. That is a carbon copy.

Q. What does the letterhead show—it shows Jesse M. Chase as an individual, does it not?

A. It is a copy of a letter, Jesse M. Chase, general office, Pocatello.

Q. What was that name you just called me; what was that name you just called me, Mr. Chase? Do you want to tell the Court what you just called me just now? A. I called you nothing.

Q. Very well, you were incorporated in January, 1947? A. That's right.

Q. And more than two years after that, on March 30, 1949, you were still using Jesse M. Chase individual stationery?

(Testimony of Jesse M. Chase.)

A. Second sheets stationery.

Q. You were still using it?

A. It has been used.

Q. And you were signing it as President?

A. Yes, sir.

Mr. Davis: We offer in evidence Defendant's Exhibit No. 13. [40]

The Court: It may be admitted.

Q. You have been President of Jesse M. Chase, Incorporated, ever since that corporation was organized? A. That is right.

The Court: We will recess at this time until 2:00 o'clock.

May 2nd, 1950—2:00 o'Clock P.M.

Q. Mr. Chase, as President of Jesse M. Chase, Incorporated, a corporation, if a judgment of Mrs. Sisil is a valid judgment—assuming that it is, what is your position, that that judgment should be paid out of the assets of the corporation or by you personally?

Mr. Bistline: We object to that as calling for a conclusion and having no bearing on the issues and being immaterial.

The Court: He may answer, the Court having control of this matter, I will permit him to answer.

A. By the corporation.

Q. The judgment, of course, is an obligation of the corporation just as much as any other obligation the corporation has? A. That is right.

Q. You never considered after you transferred

(Testimony of Jesse M. Chase.)

your real estate, and the real estate in question to the corporation [41] in 1947 that you had an interest in that real estate?

A. No, sir, I didn't.

Q. However, on the 8th of February, 1950, you and your wife did give a quit claim deed to that real estate to Donald L. Burnett, Receiver of Jesse M. Chase, Incorporated? A. Yes, sir.

Q. On February 28, 1950—strike that—you and your wife on February 8th, 1950, assigned your rights of redemption of the particular real estate in question here to Mr. Burnett as Receiver?

A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Bistline:

Q. At the time you executed this quitclaim deed in February of 1950 to that property, did you consider that you had any interest in the real estate?

A. No, sir.

Q. At the time you assigned this right of redemption did you consider that you had any right of redemption in the property? A. No.

Q. Following the incorporation of Jesse M. Chase, Incorporated, what was the practice with regard to [42] making income tax returns as to the corporation and yourself?

A. After January 1, 1947, the corporation returns were made by the corporation, and then I made my personal returns separate.

(Testimony of Jesse M. Chase.)

Q. Did you report in your personal report any income you made in the corporation?

A. I reported my personal returns separate.

Q. Since this matter has reached the status it is in, has the United States government made any claims against you personally of the income of the corporation made personally prior to that?

A. Yes.

Q. For what amount?

A. For twenty-seven thousand dollars.

Q. Do you know whether they are attempting to enforce that against the corporation?

A. I don't know.

Q. Your attention was called to a hearing in the district court before Judge Glennon, brought by the filing of a complaint, concerning a Receiver and the signing of an order, at which time you were a witness. Do you recall who called you as a witness in that case?

A. No, sir. [43]

Q. Do you recall Mr. Davis examining you there?

A. Yes, sir.

Q. Do you recall whether that hearing was started before the levy was made under this Sisil judgment?

A. I wouldn't know.

Q. Mr. Chase, calling your attention to exhibit No. 13, just look at that, that is the one that has Jesse M. Chase at the top?

A. Yes, sir.

Q. And it is signed by Jesse M. Chase, President?

A. Yes, sir.

Q. Will you explain the use of that particular

Testimony of Jesse M. Chase.)

stationery? A. That is a second sheet.

Q. Will you explain why it bears the heading Jesse M. Chase without showing corporation?

A. It would probably be stationery carried from prior to the incorporation.

Q. Do you recall how the first sheet read, the first sheet of that letter?

A. I wouldn't know now.

Q. To whom was this addressed?

A. To Mrs. Sisil.

Q. And this copy, to whom was that sent?

A. To Attorney Ben Davis. [44]

Q. Calling your attention to exhibit No. 12, do you recall about the time that was sent out?

A. At the time a meeting was called of all the creditors to be held on October 29th.

Q. The creditors of whom?

A. Jesse M. Chase, Incorporated.

Q. Was that before or after Mrs. Sisil had obtained her judgment?

A. It was in October, 1949, I think it was at that time.

Q. It was some little time before the appointment of a Receiver?

A. Yes, this meeting was held prior to the appointment of a Receiver.

Q. Was that before she received her judgment, the date of the judgment was October 1, 1949?

A. I don't know when these were mailed out, it was for a meeting to be held October the 29th.

Q. Do you know—were interest checks mailed to

(Testimony of Jesse M. Chase.)

Mrs. Sisil between the period between January 1st 1947, and the date of the Receivership?

A. What was that?

Q. Were there any interest checks mailed to Mrs. Sisil between January of 1947 and the date of the Receivership in November, 1949?

A. Yes, sir. [45]

Q. Do you know whether they were drawn on your personal account or the account of the corporation?

A. Corporation checks.

Mr. Bistline: That is all.

Recross-Examination

By Mr. Davis:

Q. You didn't have any interest whatever in the real estate, but also you gave a quit claim deed and assigned the right of redemption?

A. That is correct.

Q. Did Mr. Bistline advise you to do that, that it was necessary?

A. The request was made by the Receiver.

Q. By the Receiver that you do that?

A. Yes, sir.

Q. Did you—strike that—Mr. Chase, I am handing you exhibit No. 13, do you say that is a carbon copy and that it is not the original letter that you mailed to Mrs. Musselman Sisil?

A. That is right.

Q. It is not the one that you mailed her?

A. It should be a carbon copy.

Q. Is it? A. Yes, sir. [46]

(Testimony of Jesse M. Chase.)

Q. Who did you send the original of this letter to? A. Mrs. Sisil.

Q. This is not the one you sent her?

A. I sent that to you.

Mr. Davis: That is all.

Mr. Bistline: That is all.

Mr. Davis: If the Court please, I think that my pleadings are sufficient, but I do not want to take any chances, and I would like permission to add another affirmative defense, that the Plaintiff in this case has established—I should say that the Defendant has established from the questions asked the evidence given here, the validity of the judgment against the Receiver of the corporation, and if the prayer in my pleadings does not say so, that it be amended, that I be permitted to amend the prayer by adding that this judgment be declared to be a valid judgment against Jesse M. Chase, Incorporated.

Mr. Bistline: We want to object unless we are given an opportunity of defending against this proposed amendment—we should be apprised of this amendment which is in the form of an estoppel and we should be accorded the opportunity of defending.

The Court: The amendment will be allowed and you will be permitted to offer any defense that [47] you desire.

Mr. Davis: We rest.

WALTER R. HUBBLE

called in rebuttal by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. Your name is W. R. Hubble?

A. Yes, sir.

Q. What is your present occupation?

A. Bookkeeper.

Q. Were you previously connected with the firm of Jesse M. Chase, Incorporated?

A. Yes, sir.

Q. For how long?

A. Since the incorporation.

Q. In what capacity?

A. As Vice-President and General Manager.

Q. During the entire existence of that corporation?

A. Yes, sir.

Q. From its time of incorporation up to the time of the Receivership?

A. Yes, sir.

Q. Are you a stockholder in that corporation?

A. Yes, sir.

Q. How many shares do you have?

A. Twenty-one shares of common stock and fourteen of preferred.

Q. When did you acquire this common stock?

A. At the time of the incorporation or soon thereafter, I cannot give the dates, but it is on the books.

Q. Referring you to Defendant's Exhibit No. 5,

(Testimony of Walter R. Hubble.)

the stock book of the common stock, would you check through that and tell us what stock you acquired and when?

A. On January 15th, 1947, one share.

Q. Will you state what consideration was paid and how it was paid?

A. One hundred dollars in cash. On January 31st, 1947, twenty shares and paid for in surrender of cash assets.

Q. And what year did you say that was?

A. 1947.

Q. Proceed, Mr. Hubble, you said it was by the surrender of cash assets?

A. Yes, investment certificates I had of Jesse M. Chase.

Q. Personally?

A. Yes, personally, that seems to be it.

Q. Now, then, Plaintiff's Exhibit No. 8, the book of the preferred stock, would you check through that and state what stock you held, of the preferred stock, and state when you acquired it and what the consideration was? [49]

A. On February 1st, 1948, eleven shares.

Q. Will you state what the consideration was for that stock?

Mr. Davis: I object to that as incompetent, irrelevant and immaterial, being over a year after the corporation was formed when this party who was one of the incorporators and had knowledge of the assumption of Mrs. Sisil's certificate, the taking of preferred stock by an officer of a corporation

(Testimony of Walter R. Hubble.)

could not in any way be a defense as against her judgment in this matter.

The Court: He may answer for what it may be worth, the Court will give it such weight and consideration as it thinks the matter is entitled to, and at the same time considering your objection.

A. This stock was issued upon surrender of one investment certificate that I had bought for cash, investment certificate of Jesse M. Chase.

Q. And how many shares was that?

A. Eleven. On October 22, 1948, three shares of preferred stock for which I paid cash.

Q. Do you recall how much cash?

A. Three hundred dollars.

Q. Any other stock that you hold?

A. No, sir, that is it. [50]

Q. Are you familiar with the holding of the other stockholders of common stock in the corporation?

A. There were other holders.

Q. Are you familiar with the consideration each of them paid?

A. I think the books disclose it.

Q. Could you tell what they paid by looking at those?

A. I don't know as I could.

Q. Will you look through this and see if it refreshes your memory.

A. What do you want me to do?

Q. What I want you to testify to is the consideration paid by the stockholders of each of the shares of stock, the common stock.

A. The first three shares Mr. Chase, myself and

(Testimony of Walter R. Hubble.)

Mr. Nelson, I saw the checks that paid for those.

Q. Calling your attention to the W. G. Ash certificate for twenty shares, are you familiar with that certificate?

A. He had a certificate that he turned in, I couldn't say without turning to the books.

Q. Could you by turning to the books?

A. This is the ledger for 1949, and that was in 1947.

Q. Do you know whether he paid cash? [51]

A. The equivalent of cash.

Q. Do you know what equivalent of cash he paid?

A. Investment certificates of Jesse M. Chase.

Q. Of the same value?

A. Of an equal value, these were reissued to Mr. Chase at the time he surrendered his personal holdings for the corporation holdings.

Q. Is there any other stock outstanding?

A. Norville Anderson, I don't remember about that without looking at the books.

Q. I believe that we can save time by referring to Defendant's Exhibit No. 6, here is a list of the holders of preferred stock, are you familiar with the consideration paid for preferred stock as shown here?

A. I know it was bought and paid for but I don't know that I can say how without looking at the books.

Q. Can you look over the list and give us any further information. Could you give us any further

(Testimony of Walter R. Hubble.)

information in regard to the manner of payment for the various issues of preferred stock?

Mr. Davis: Do you have an independent recollection of the dates of those transactions and how these people paid for this stock?

A. I couldn't give you the dates.

Mr. Davis: The real proof and the [52] real evidence would be the books of the corporation?

A. That would be the ledger.

Mr. Davis: We object to this witness trying to testify about that.

The Court: The books would be the best evidence.

Mr. Bistline: We certainly agree with that.

Q. Do you have any independent recollection as to this?

A. I know that these people have the stock and bought stock, but as to the details I do not know.

Q. You have no independent recollection?

A. No, I have not.

Mr. Bistline: I believe that is all.

Cross-Examination

By Mr. Davis:

Q. How long have you been or were you associated with Mr. Chase in a business way?

A. Since 1932.

Q. Now, you had some investors' certificates or investment certificates which you exchanged for twenty shares of common stock?

A. Yes, sir.

(Testimony of Walter R. Hubble.)

Q. At that time you were an officer of the corporation? A. Yes, sir. [53]

Q. And all of the times from the time this corporation was formed or incorporated up to the present time you have been and are an officer of the corporation? A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Bistline:

Q. At the time of the incorporation do you recall what the status of the corporation was in regard to being solvent or insolvent?

A. I think the financial statement shows that it was solvent.

Mr. Bistline: That is all.

Recross-Examination

By Mr. Davis:

Q. You knew all about it, you had been working there for years?

A. I knew something of the operation.

Q. You were the general manager?

A. I had access to the books and I knew what was going on.

Mr. Davis: That is all.

Mr. Bistline: That is all.

DONALD L. BURNETT

recalled in rebuttal by the Plaintiff, having heretofore been duly sworn, testifies as follows: [54]

Direct Examination

By Mr. Bistline:

Q. Mr. Burnett, I want to call your attention to a situation in February of this year when a redemption was effected of the property involved in this suit by you as Receiver of Jesse M. Chase, Incorporated, a corporation, please state what the circumstances were leading up to that redemption?

Mr. Davis: I object to that as incompetent, irrelevant and immaterial and hearsay, and not the best evidence. The Plaintiff in this case—I assume it is an attempt and he certainly cannot come in and attempt to attack or show that the redemption made in this Court on the United States Marshal's certificate is anything other than it purports to be on its face.

The Court: He may answer subject to your objection, the Court will give it such weight as it is entitled to.

A. You wish me to relate the circumstances as I see them leading up to the redemption?

Q. That is right.

A. A short time after I was appointed Receiver we opened negotiations to get bids on the real estate; the bids were opened and C. C. Andersons were the high bidders. It was the high bid that we received and we thought it [55] to be an excellent

(Testimony of Donald L. Burnett.)

offer—it was \$80,000.00 to be exact; we were pleased and anxious to consummate the deal. There had been considerable dealing and the agent for Andersons was anxious to complete the transaction; shortly after we accepted their bid and began to transfer the real estate, or rather the title to the real estate, their attorney advised us that we would have to furnish title insurance; they came in—their representatives came in with a purported list of what I called clouds on the title; these matters would have to be taken care of before they would issue a title insurance policy. Most of these items were creditors—judgment creditors against Jesse M. Chase and they gave us no particular problem. We recognized them and subsequently paid them. Mr. Seda, however——

Q. Who is Mr. Seda?

A. Attorney for the title company, he advised with an attorney at Boise. This property had been sold at United States Marshal's sale to Mrs. Sisil; Mr. Davis was her attorney, for some thirty-two hundred dollars and before they could issue title insurance that cloud would have to be removed. It was his opinion that this sale perhaps had not been a legal one.

The Court: This witness is testifying about things now that are certainly not admissible in [56] evidence, but he may go ahead, there is no objection.

A. He told me that we would have to clear the title whether it was a bona fide one or not. He could not issue the title policy until we cleared the title.

(Testimony of Donald L. Burnett.)

His suggestion was that we redeem the property and we proceeded at Mr. Seda's suggestion and we obtained this quit claim deed and this assignment of redemption. It was my thought that our efforts to redeem would not be successful, we were disturbed because the representative of the C. C. Anderson Company advised us that if we could not consummate the deal that they would have to withdraw their bid which would be disastrous as the next bid was some \$20,000.00 less and we decided to go to the Marshal at Mr. Seda's suggestion, although he considered it superfluous.

The Court: How do you know that it was superfluous?

A. Those were his words, he told us that we would have to redeem and he advised me to get the quit claim deed and the right of redemption, and we proceeded to Boise to effect the redemption and I filed it as a matter of record. It was done at my own instigation after advising with counsel solely upon the statement that they would not be able to issue title insurance. That we must do that before the title insurance was given [57] and C. C. Anderson Company said they would withdraw their bid. We had a good many thousands of dollars at stake and we proceeded exactly as I have related to you.

Q. Did you at that time recognize that Jesse M. Chase had any interest in this property?

A. No, sir, my original plans in going to Boise—

(Testimony of Donald L. Burnett.)

The Court: I think you have answered the question by No, Sir.

Q. Did you make any effort to dispose of this matter—to dispose of this cloud on the title by asking for an early hearing on this case?

A. Yes, sir.

Q. Before redemption?

A. Yes, sir, before the day of redemption.

Mr. Bistline: I think that is all.

Cross-Examination

By Mr. Davis:

Q. If I understand it now, you didn't consider that Mr. Chase had any interest in this property, but under heavy pressure which was on you, and you saw that you could get the sale through you went ahead and recognized his title and took the assignment of redemption and the quit claim deed from him?

A. I didn't recognize that he had any title. [58]

Q. Why did you want the quit claim deed and the right of redemption?

A. The Title Insurance Company said that it would be wise.

Q. And the attorney told you until you got it that the title would not be good and they would not give you any money?

A. The Title Insurance Company said that the title would not be good.

Q. Are you trying to take the position that you did something illegal to get this through——

(Testimony of Donald L. Burnett.)

A. —I don't think your statement is fair. I thought it was the law.

Q. Whether you thought it was the law or thought it was right, in order to sell this property and get the money from this good offer you had to redeem that property and had to recognize Mrs. Sisil's certificate from the Marshal as being good, didn't you? A. Mr. Seda told me—

Q. —I think you can answer that without saying what Mr. Seda said.

A. Not as you stated.

Q. At any rate, it was a benefit to the corporation to have this sale go through, and it was such a benefit that you took the money out of the assets of the corporation and redeemed from the Marshal's sale? A. Yes, sir. [59]

Q. You petitioned the District Court to be permitted to do that? A. Yes, sir.

Q. And you didn't say anything in there about it being illegal, you didn't say anything about it being wrong at all? A. No, sir, I did not.

Q. You verified your petition to the Court?

A. Yes, sir.

Q. And the Court in his order gave you authority to redeem and never made any reservation whatever in it?

A. Not to my recollection—he approved the petition.

Q. Now, Mr. Burnett, maybe I can state this so that it will be fair. Do you consider, and is it your position, that you could recognize for one purpose

(Testimony of Donald L. Burnett.)

Jesse M. Chase having an interest in it and taking a quit claim deed and an assignment of redemption, and that you could recognize that as being valid when it comes to protecting the property assets, and that you can deny it being valid now when it is to your advantage, after you once recognized it?

A. That is not my position.

Q. That is what you are trying to do isn't it?

A. No, sir.

Q. Mr. Burnett, you testified as to what Mr. Sega told you [60] to do, but that he didn't consider the sale was of any legality, have you any written opinion from him?

A. No, sir.

Q. Didn't Mr. R. D. Merrill representing Andersons go in and examine this title?

A. Yes, sir.

Q. Have you a written opinion from him?

A. No, sir.

Q. He told you that in view of the manner in which this corporation was formed that you would have to get this quit claim deed from Jesse M. Chase and he would not approve it until it was cleared up?

A. His position was that I would have to have a title insurance policy.

Q. You are familiar with the suits of Doctor Merrill and Doctor Pond that are pending?

A. Yes, sir.

Q. Against Jesse M. Chase individually and the corporation?

A. Yes, sir.

Q. They are on investors' certificates signed by Jesse M. Chase only?

A. Yes, sir.

(Testimony of Donald L. Burnett.)

Q. And you are holding this money out of the assets to pay these claims?

A. We pledged it with the clerk of the court. [61]

Mr. Davis: I believe that is all.

Redirect Examination

By Mr. Bistline:

Q. In the case of C. W. Pond against whom was that suit brought?

A. Against Jesse M. Chase individually, and Jesse M. Chase, Incorporated, jointly.

Q. And you made a deposit with the Court to protect the attachment? A. Yes, sir.

Q. Did you do that because they were suing Jesse M. Chase, individually? A. No, sir.

Q. Did you do that because they were suing the Jesse M. Chase corporation?

A. That is the reason.

Q. And this money that was paid in, were those judgments against Jesse M. Chase individually?

A. No, sir.

Q. They were against Jesse M. Chase, Incorporated? A. Yes, sir, they were.

Q. I will ask you to explain your position with regard to this redemption.

The Court: I think we will take a short recess at this time. [62]

(Testimony of Donald L. Burnett.)

3:00 o'Clock P.M.—May 2nd, 1950

Q. I want to call your attention to page 29 of Defendant's Exhibit No. 4, the same being the abstract of title, and appearing on page 29 is the assignment of right of redemption, and I call your attention to the wording of this assignment: "That I, Jesse M. Chase, Judgment Debtor, in the hereinafter referred to judgment, do, for value received, hereby assign, to Donald L. Burnett, Receiver of Jesse M. Chase, Incorporated, a corporation, pursuant to appointment by order of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, in the case wherein J. A. Youngren is Plaintiff and Jesse M. Chase, Incorporated, a corporation, is Defendant whatever right of redemption I may have as such Judgment Debtor to redeem whatever right, title, interest, or estate I may now have, or may have had at the time of or at any time since the entry of judgment by judgment lien, or levy of execution in and to the hereinafter described property from that certain sale conducted by the United States Marshal for the District of Idaho, on November 26, 1949, at court house in Pocatello, Bannock County, Idaho, upon execution issued upon the judgment entered in case of Louise B. Musselman Sisil, Plaintiffs, against Jesse M. Chase, Defendant, in District Court [63] of the United States for the District of Idaho, Eastern Division, a particular description of said property being as follows," and property is then

(Testimony of Donald L. Burnett.)

described. I will ask you if by acceptance of that right of redemption, if you felt that you were getting any right, title, or interest in that real estate?

A. No, sir.

Q. Now I call your attention to page 30 of the same exhibit, there is a quit claim deed, and I will ask you if you felt that by the acceptance of that quit claim deed that you were acquiring any right, title or interest to the property described in the deed, which is the property involved in this action?

A. No, sir.

Q. I will ask you, did you try to make any other arrangements with the Title Insurance Company to issue a policy rather than going through this redemption process?

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, he did not make any other arrangements.

The Court: He may answer.

A. Yes, sir, I did try to.

Q. What did you try to do?

A. Similar to the Doctor Pond and the Doctor Merrill situations, by making a deposit with the clerk of the court of an amount to protect them against this situation. [64]

Q. Were you successful in that?

A. No sir, they insisted that I redeem.

Q. I think you testified that the Title Insurance Company or Mr. Seda did not require the redemption because he recognized this as a lien?

A. He did not recognize it as a lien.

(Testimony of Donald L. Burnett.)

Q. Then do I understand from your testimony that you effected this redemption as the only means open to you to save this sale? A. Yes, sir.

Q. And to furnish a title insurance policy such as demanded by the purchaser?

A. That is correct.

Mr. Bistline: That is all.

Mr. Davis: For the purpose of the record I want at this time to move to strike from the record all of the testimony of this witness with reference to what Mr. Seda told him as being hearsay, incompetent, irrelevant and immaterial.

The Court: Yes, I think it is, but I will take your motion under advisement up and and will give it such weight as I think it is entitled to.

Recross-Examination

By Mr. Davis:

Q. Who did you try to make these arrangements with to keep [65] from redeeming?

A. With the Title Insurance Company.

Q. Now then, if I understand your testimony, you went to the District Judge and got permission to redeem from the Marshal's sale and paid in the neighborhood of \$3300.00 of the Receiver's money, of the assets of this corporation, for the redemption certificate or the assignment of the right to redeem that you knew and had been advised wasn't worth a penny?

A. The Title Insurance Company told me and I had to or lose the \$80,000.00 sale.

(Testimony of Donald L. Burnett.)

Q. You knew that Chase had no legal right to the property at all, that the Title Insurance Company told you that he had no legal claim and that it was all superfluous, and still you went ahead and paid the money out?

A. That is what they told me.

Q. You went ahead and paid the money?

A. Yes, sir.

Q. You knew that you were recognizing this assignment by Jesse M. Chase as being legal, and you were doing it in order to make the sale go through?

A. We did it to consummate the sale.

Q. I want to ask you if it is your position that if this Court should hold that Mrs. Sisil's judgment is not a legal judgment in effect,—let me withdraw that,—I want to ask you, Mr. Burnett, if it is your position [66] that if this Court should hold that Mrs. Sisil's judgment has no legal effect as a judgment against this real property and this property, if you intend to sue her for the return of the money on the theory that the redemption was illegal or that you redeemed from an illegal judgment?

A. I have not formulated an opinion.

Q. You have discussed it with counsel?

A. Not to formulate an opinion.

Q. But you have discussed it, whether you would or not?

A. There was a discussion whether it was a technical legal possibility.

Q. (By Mr. Davis): I would like to inquire of counsel for the plaintiff if it is their position if they

(Testimony of Donald L. Burnett.)

should be successful in this, if they intend to try to proceed on the basis that it was illegal,—

Mr. Bistline: I will say this, that before this redemption was effected a survey was made by the Receiver to ascertain whether the dividends which would be available for Mrs. Sisil would be equivalent to the amount of money paid or put up for the redemption; after a careful survey it was decided that the dividend would be equivalent and therefore he would have no risk, and we felt that a suit would lie and be an offset [67] against any claim.

Mr. Davis: I think that is all.

Mr. Bistline: That is all.

The Court: I am interested in asking about one matter. You obtained an order from the District Court under whom you are a Receiver, to pay this money to the Marshal in making this redemption?

A. Yes, sir.

Q. Did you advise the Court at the time you received this order of the circumstances with which you were confronted in getting title, and that you had been advised that it was not necessary for you to legally do this, but that you had to do it, did you advise the Judge of that? A. Yes, sir.

Q. You told him that your counsel had advised you that it was not a legal application?

A. Yes, sir.

The Court: And the court made the order for you, knowing that it was not an obligation of Jesse M. Chase, Incorporated?

(Testimony of Donald L. Burnett.)

A. Yes, sir, after what Mr. Bistline said where we made some detailed analysis and felt that we would be paying Mrs. Sisil that amount of money,— [68]

The Court: I am interested in whether you or your attorney advised the Court that this was what you now say, an illegal payment of this money?

A. Yes, sir, I think the term “business duress” was used during the discussion.

The Court: I realize that the abstract of title, outside of this redemption, before the redemption was ever made and before the judgment was ever recorded, shows in the corporation. I take it now that the Receivership does not recognize any obligation to this Defendant. It is your contention, Mr. Bistline, that the fact that you have a judgment against Jesse M. Chase that there is no obligation against the corporation to pay it?

Mr. Bistline: No, your Honor, the corporation is obligated to her on the original obligation of the investment certificates; that suit would still lie, or would have been available to her up to the time of the filing of the Receivership.

The Court: But now that she didn't, it is your contention that her claim is not a valid claim?

Mr. Bistline: No, we recognize it is a valid claim against the corporation and the Receiver so testified. May I make another suggestion, that the balance sheet shows that this corporation was not [69]

insolvent but was solvent to some \$170,000.00, and paid income tax for 1947,—

The Court: Then I do not understand why there is a Receivership,—I think that Jesse M. Chase is a pretty smart man; he was the moving factor in getting this placed in a Receivership, certainly the Court was misinformed as to the fact that they could pay off all of their debts.

Mr. Bistline: I would like to introduce the income tax returns.

The Court: You can put them in if you desire, I don't know what help they will be to the Court. As far as this sale is concerned it is the business of Jesse M. Chase or who ever represented his business, Jesse M. Chase in the start, and it was Jesse M. Chase at the time the corporation was organized, and in my opinion it is still Jesse M. Chase. He was the moving factor in getting the Receiver appointed and the Receiver is more or less the agent now of Jesse M. Chase, not technically, but morally. This Receiver would not be here now except for the action of Jesse M. Chase; knowing him as I do know him I am convinced he is a pretty smart man. It seems to me that he could have handled this as well if he had not made these moves that have been made. There is an old saying that people who come into Court of equity and ask for relief should come with clean hands; I don't know how clean they are here, however, there may be a question of law and I am going to ask you Gentlemen for briefs on your positions. You may have time to answer whatever brief the plaintiff cares to present. I am going to

take this matter under advisement; unless there is some oral argument you wish to present now I will allow you ten days, Mr. Bistline, and Mr. Davis may have ten days in which to file his reply brief, and you may have an additional five if there are matters that you care to answer in Mr. Davis' brief.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court for the District of Idaho, and

I further certify that I took the evidence and proceedings had in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into longhand (typewriting) and

I further certify that the foregoing transcript consisting of pages numbered consecutively to page 71 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand this 16th day of October, 1950.

/s/ G. C. VAUGHAN,
Court Reporter.

[Endorsed]: Filed October 24, 1950.

[Title of Court and Cause.]

CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files designated and stipulated by the parties to be forwarded to the Ninth Circuit Court of Appeals, and as are necessary to the appeal under Rule 75 (RCP):

1. Amended Complaint (Attached, as Exhibit "A" to the Petition for Removal).
2. Answer to Amended Complaint and Amended Answer to Amended Complaint.
3. Transcript of Evidence.
4. Memorandum of Decision.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. Designation of Record on Appeal.
9. Order Extending Time for Appeal to be docketed in the Circuit Court.
10. Stipulation to transmit original exhibits.
11. Exhibits Nos. 1 to 15 inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 8th day of November, 1950.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 12738. United States Court of Appeals for the Ninth Circuit. Fred D. Hilliard as Receiver of Jesse M. Chase, Inc., a Corporation, Appellant, vs. Louise B. Musselman Sisil, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed November 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

No. 12738

FRED D. HILLIARD, Receiver of JESSE M.
CHASE, INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Respondent.

STATEMENT OF POINTS

Appellant states that the points upon which he intends to rely on appeal in the above-entitled action, and he deems the entire record on appeal as necessary for the consideration of the points to be relied upon namely:

1. The trial court erred in entering judgment for the defendant and respondent for each of the following reasons:

(a) that defendant's answer, affirmative defenses, and counterclaim do not state facts sufficient to constitute a defense to plaintiff's amended complaint, or to state a cause of action as a counter claim;

(b) that the evidence is insufficient to constitute a defense to plaintiff's amended complaint, or to support defendant's counter claim.

(c) that the findings of fact are insufficient to support the judgment, and

(d) that the judgment is contrary to both the law and the evidence.

2. The trial court erred in finding in its Memorandum Decision

“That he (Jesse M. Chase) was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it.”

for the reason and upon the ground that it is contrary to the evidence.

3. The trial court erred in making each of following findings of fact:

(a) That portion of Finding of Fact IV reading as follows:

“* * * the transfer by Jesse M. Chase and wife to the said Jesse M. Chase, Inc., a corporation of the real estate heretofore and in plaintiff's amended complaint described was without consideration;”

(b) That portion of Finding of Fact V reading as follows:

“* * * the said corporation was organized Solely for the benefit of the said Jesse M. Chase; that he was, for all practical purposes the sole and only owner of all of the corporation stock of said corporation, having used the names of a few of his employees in the incorporation of Jesse M. Chase, Inc., solely in order to comply with the corporation laws of the State of Idaho, and there was no consideration for the transfer of the assets of Jesse M. Chase, an individual to Jesse M. Chase, Inc., a corporation, and

that insofar as the rights of Jesse M. Chase, Inc., and of the defendant herein were concerned, the said Jesse M. Chase, Inc., and the said corporation held the assets in trust for the payment of defendant's claim."

(c) That portion of Finding of Fact VI reading as follows:

"* * * that the transfer of all of the assets of Jesse M. Chase used in and about the used car business operated by him, to said corporation in exchange for corporate stock, issued to said Jesse M. Chase, was a fraud upon the defendant herein,"

(d) That portion of Finding of Fact VI reading as follows:

"* * * that said Jesse M. Chase, Inc., took and accepted the real estate described in plaintiff's Amended Complaint and all of the assets, real and personal transferred to it by Jesse M. Chase, an individual as Trustee for the benefit of this defendant, and that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry, was and is a valid lien upon the real estate in plaintiff's amended complaint referred to."

(e) All of Finding of Fact IX.

(f) That portion of Finding of Fact X reading as follows:

"That the said plaintiff herein, the Receiver of Jesse M. Chase, Inc., took over and accepted the real estate described in plaintiff's amended complaint, and took over and accepted any and

all other assets of the said corporation, subject to the judgment of Louise B. Musselman Sisil, and against Jesse M. Chase, an individual as aforesaid, * * *

(g) That portion of Finding of Fact X reading as follows:

“* * * and that Louise B. Musselman Sisil is entitled to a judgment and decree directing the plaintiff to make payment of any balance due upon her judgment as aforesaid, in the same manner as any and all other judgments entered against Jesse M. Chase, Inc., have been paid by said Receiver.”

(h) That portion of Finding of Fact XI reading as follows:

“* * * and that upon the filing and recording of said abstract of judgment, the same became and was a lien upon all of the assets of Jesse M. Chase, Inc., a corporation in accordance with the laws of the state of Idaho.”

for the reason that each and all of them are conclusions of law, are unsupported by the evidence, and are contrary to law and the evidence in the case.

4. The trial court erred in making finding of Fact VII for the reason that the facts therein found are immaterial, and, in no way constitute a defense or contribute to constituting a defense to plaintiff's amended complaint, and for the further reason that the same are conclusions of law, not supported by the evidence.

5. The trial court erred in making Finding of Fact No. VIII for the reason that the facts as found therein, or any of them, do not in any way constitute a defense, or contribute to constituting a defense to plaintiff's amended complaint, and are immaterial.

6. The trial court erred in making Finding of Fact XII for the reason that same is a conclusion of law, contrary to both the evidence and the law.

7. The trial court erred in making Conclusions of Law numbered I, II, III, IV, V and VI for the reason that there is no evidence in the record to sustain same, and that each and all of them are contrary to law, and to the evidence.

8. The trial court erred in not entering judgment for plaintiff as prayed in his complaint for the reason that the evidence establishes a prima facie case for plaintiff, and there is no evidence in the record sufficient to constitute a defense thereto.

/s/ F. M. BISTLINE,

/s/ R. DON BISTLINE,

Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 16, 1950.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District
of Idaho, Eastern Division.

F. M. BISTLINE
Pocatello, Idaho

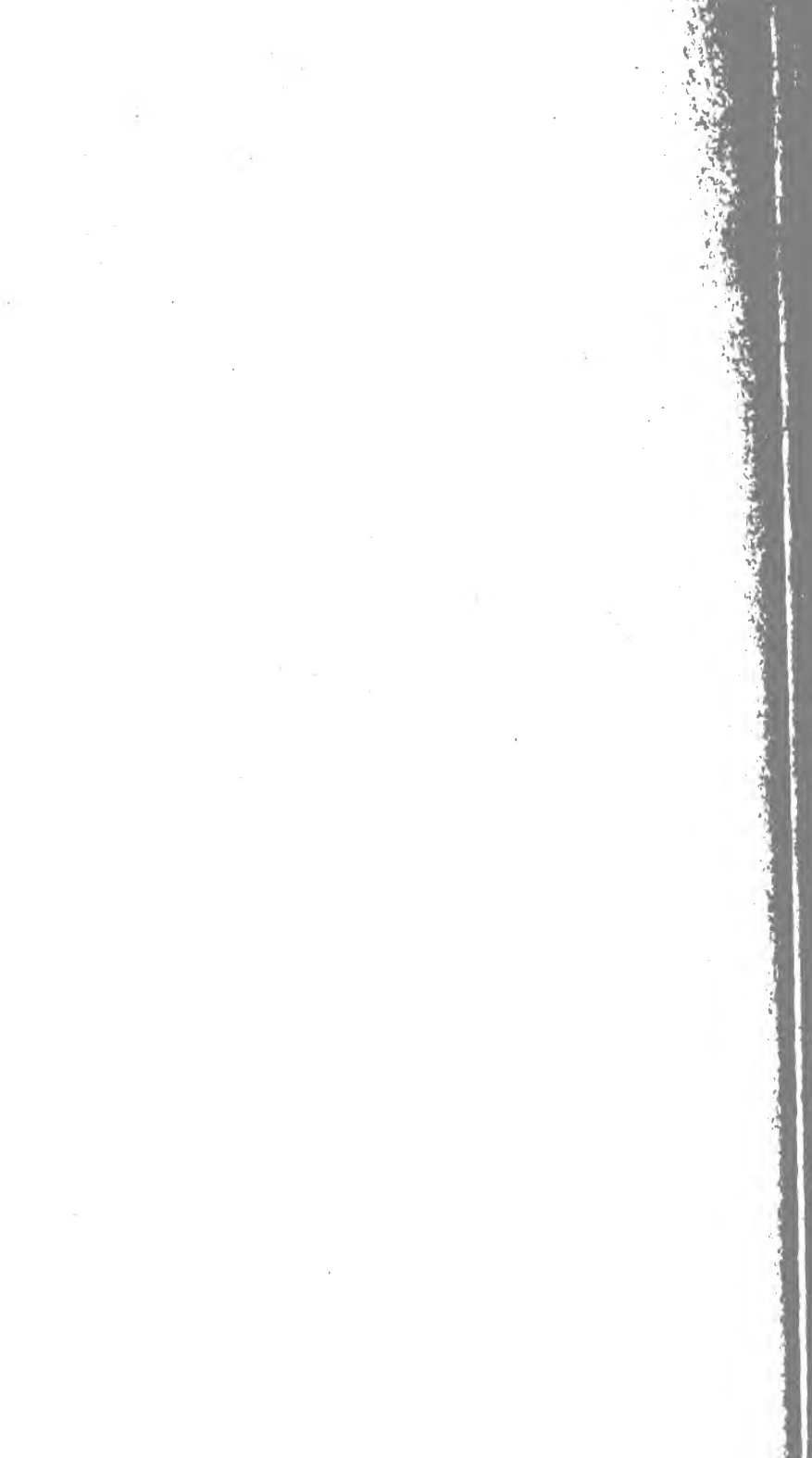
R. DON BISTLINE
Pocatello, Idaho
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Pocatello, Idaho
Attorney for Appellee.

FILED

JAN 4 1951

PAUL P. O'BRIEN,
CLERK



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
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Brief of Appellant

Appeal from the United States District Court for the District
of Idaho, Eastern Division.

F. M. BISTLINE
Pocatello, Idaho

R. DON BISTLINE
Pocatello, Idaho
Attorneys for Appellant

B. W. DAVIS
Pocatello, Idaho
Attorney for Appellee.

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Brief of Appellant

JURISDICTIONAL FACTS.

This is an action to quiet title to real estate situate in Pocatello, Idaho, brought by appellant, a citizen of Idaho against the appellee, a citizen of California. Said real estate was at the time of the commencement of the action and now is of a value of over \$3,000.00. The suit was commenced in the District Court of the Fifth Judicial District of the State of Idaho, and removed to the United States District

Court for Idaho, upon appellee's petition. (p. 3, 4, 5). 62 Stat. 930. F. C. A. 28, Sec. 1332.

STATEMENT OF FACTS

For several years prior to January 1, 1947, Jesse M. Chase of Pocatello, Idaho, was engaged in the used car and trailer sales business. As of that date he caused the business to be incorporated under the laws of Idaho, using the name "Jesse M. Chase, Inc." and transferred the entire business to the corporation in exchange for stock. At the time of said incorporation and the transfer of the property to the corporation, he owned and was actively operating 47 markets in eleven different states, namely, 11 in Idaho, 3 in Oregon, 3 in Illinois, 4 in Montana, 6 in California, 3 in Washington, 2 in Nevada, 5 in Wyoming, 6 in Utah, 3 in Arizona, and 1 in New Mexico, all of which were included in the transfer (Plaintiff's Exhibit "10").

Prior to the incorporation, and while Chase was doing business as an individual, appellee's then husband, William H. Musselman, invested in the Chase business by way of what was termed "Jesse M. Chase Investment Certificates",—same being in the nature of promissory notes, which were signed by said Chase personally. Said "Investment Certificates" became the property of appellee, by reason of the death of Mr. Musselman. (p. 47; Exhibit "6")

The mechanics of the transfer of the property of the indi-

vidual, Chase, to the corporation, Jesse M. Chase, Inc., was in the usual form of a written offer incorporated into the minutes of the corporation, and the acceptance thereof by resolution of the Board of Directors. The transfer was made as reflected by the audit and balance sheet as of December 31, 1946, prepared by Crane & Heider, Certified Public Accountants, with offices at Denver, Colorado, subject to the liabilities as verified and contained in said audit including the liability of Jesse M. Chase assumed by reason of the issuance heretofore to various persons of notes designated as 'Jesse M. Chase Investment Certificates.'" (Plaintiff's Exhibit "10").

This balance sheet on which the transfer of the Chase properties to the corporation was made, shows a net worth of the properties transferred of \$175,377.53 as of the close of business December 31, 1946, which figure constituted Jesse M. Chase's then net worth in said properties (Plaintiff's Exhibit "11").

In exchange for the property of the book net worth of said \$175,377.53, the corporation issued to said Chase, common stock of the par value of \$164,000.00,—same being 1640 shares of common stock of the par value of \$100.00 each (Plaintiff's Exhibit "10"). The balance was subsequently accounted for in additional stock issue and paid-in surplus.

Jesse M. Chase, Inc., the corporation, was organized with three stockholders, namely, Jesse M. Chase, Walter R. Hubble, and I. H. Nelson, each subscribing and paying in, in cash,

\$100.00 for a share of common stock (p.77) (Plaintiff's Exhibit "9"). Subsequently and on January 31, 1947, said Walter R. Hubble purchased 20 more shares for \$2000.00, and paid for the same by the surrender of cash assets in that amount (p.77).

Among the properties transferred by Chase and wife to the corporation in exchange for stock, was the real estate, which is the subject matter of this quiet title suit, same being, Lots 17, 18, 19 and 20 in Block 235 of Pocatello Townsite, on which is located a one-story stucco building occupying the entire lot space, which is adjacent to the vacant lots described as the North 25 feet of Lot 15 and all of Lot 16 in the same block. The Lots 6 and 7 in Block 267 were vacant lots across the street west of the garage and were used as part of a used car lot.

This real estate was conveyed to the corporation by Warranty Deed executed and delivered by said Chase and wife to the corporation on February 10, 1947, and was recorded in the office of the County Recorder of Bannock County on February 12, 1947, and is in evidence as Plaintiff's Exhibit No. 3 (p.39).

The business was operated under the corporation set-up beginning as of January 1, 1947, and continuing until the date of the receivership, November 5, 1949. During the year 1947 gross sales amounted to \$10,979,156.29, and resulted in a gross profit on sales of \$1,246,194.55, and a net profit before provision for income taxes of \$28,666.94 (Plaintiff's Exhibit "15").

Heavy business losses, totalling \$207,813.61, were sustained by the Jesse M. Chase, Inc., corporation during the years 1948 and 1949. The principal items of the loss are set forth in Defendant's Exhibit "6", and are as follows:

"Surplus loss end year 1948..... (87,572.53)

Operating Loss—

Stores closed year 1949..... (96,320.88)

Operating Loss—

General Office Year 1949..... (23,938.20)."

On October 1, 1949, appellee herein, Louise B. Musselman Sisil, as plaintiff therein, obtained a judgment against *Jesse M. Chase*, the individual, in the sum of \$10,330.73 on a suit on \$14,000.00 face value of Investment Certificates signed by Chase and issued by him prior to the incorporation. This judgment was obtained in the United States District Court for Idaho. *The corporatoin, Jesse M. Chase, Inc., was not a party to said suit.* Transcript of this judgment was filed in the office of the County Recorder of Bannock County, Idaho, on October 15, 1949, and about the same time execution issued on the judgment and levy was made October 31, 1949, upon all the right, title and interest of Jesse M. Chase in and to the real estate, the subject matter of this action, standing on the records of Bannock County in the name of the corporation, Jesse M. Chase, Inc. The United States Marshal went through the formalities of a sale on November 26, 1949. (Plaintiff's Exhibit "4"). Appellant was appoint-

ed Receiver November 5, 1949, which was five days after the levy. (Plaintiff's Exhibit "2"). The U. S. District Court number for said case in which Sisil obtained judgment against Chase is 1539.

At the time this judgment was entered, October 1, 1949, at the time of the filing of the transcript of same with the County Recorder, at the time of the levy and at the time of the sale under execution, of the real estate in question the stock holdings in the corporation, Jesse M. Chase, Inc., were as follows: (Defendant's Exhibit "5"—Plaintiff's Exhibit "8").

Name of Stockholders	Shares of Common Stock	Shares of Preferred Stock
Jesse M. Chase	1716	22
Walter R. Hubble	21	14
I. H. Nelson	1	—
W. G. Ash	20	—
N. M. Anderson	1	11
Lee C. Bloxham	—	30
C. P. Groom	—	10
J. A. Youngren	—	2
Byron S. Dee	—	50
B. W. Briggs	—	60
E. W. Curry	—	1
D. L. Edlefsen	—	47
Crane & Heider	—	11
W. T. Ingram	—	10
George W. Pew	—	9
Total	1759	278

We believe the foregoing constitutes a statement of all the material facts necessary to a determination of this case. However, in view of the filing of an amended answer and counter claim by appellee following the trial (p. 12-18) by permission of the Court (p. 75) we deem it advisable to present the following additional facts:

While the case was awaiting trial the Receiver obtained a favorable opportunity to sell the real estate in question, and in order to meet requirements of the Title Insurance Company and the purchaser, he went through the motions of a redemption of *any* right, title or interest which Jesse M. Chase, may have had in said property, which might have been subject to such execution sale (p. 82, 83, 84). The proceedings appear in the abstract of title in evidence as Plaintiff's Exhibit "4". At the time of the execution and delivering of the assignment of said "right of redemption" and the quit claim deed, neither Chase nor the Receiver considered that Chase had any interest in the property. (p. 71, 85)

HISTORY OF THE CASE.

The original complaint in this action was filed November 16, 1949, in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, in the nature of quiet title action. Temporary injunctive relief to restrain the United States Marshal from making the sale was sought but not granted (p. 41, 42) and amended complaint was filed in the same court on November 28, 1949, and the Marshall dropped as a party defendant. (p. 6, 7, 8).

The cause was removed to the United States District Court for Idaho on appellee's petition (p. 3, 4, 5). Answer to the amended complaint was filed on December 13, 1949. (p. 9-12). The case was tried May 2, 1950. Pursuant to leave granted during the trial (p. 75) appellee filed an amended answer, including two alleged affirmative defenses, and a counterclaim on May 22, 1950.

SUMMARY OF PLEADINGS.

Appellant's amended complaint is in the usual form of a quiet title suit. Appellee's amended answer (p. 12, 13) admits the appointment of the Receiver; the incorporation of the Jesse M. Chase, Inc., corporation; that the record title to the real estate in question was in said corporation, alleging, however, that the property was nevertheless owned by Chase the individual, and if not owned by him that it was held in trust by the corporation for the payment of his debts, and especially appellee's \$10,330.73 judgment against him, and that such real estate is subject to the lien of said judgment.

Her first affirmative defense (p. 13, 14) is to the effect that the Jesse M. Chase, Inc., corporation, was organized by Chase, the individual, solely for his own benefit; that it was operated by dummy directors in the employ of Chase; that the transfer of assets by Chase to the corporation was "without any consideration whatever except for the issuance of corporate stock"; that Chase "for all legal intents and purposes" was the owner of all the stock issued by said corporation; that the corporation "assumed the payment of certain Investor

Certificates outstanding and signed by Jesse M. Chase, an individual"; that appellee was owner of such Investors Certificates, and that her judgment against Chase was upon such certificates; that the transfer of the property by Chase to the corporation was in fraud of appellee as a creditor and of creditors generally; that the corporation accepted said real estate as trustee for the benefit of appellee, and that her judgment against Jesse M. Chase is a valid lien upon the real estate held by the corporation.

Appellee's second affirmative defense (p. 15) is to the effect that the real estate in question was sold at Marshal's sale on appellee's judgment against Chase and was redeemed by appellant, after his obtaining assignment of right of redemption from Chase, and that said acts constituted an estoppel of appellant. It further averred that the Receiver had no greater right by reason thereof than the corporation had.

Appellee's counter claim (p. 16, 17, 18) alleges that Jesse M. Chase and Jesse M. Chase, Inc., the corporation, was one and the same person or concern; that her judgment against Chase, the individual, was a judgment against the corporation property of Jesse M. Chase, Inc., by reason of the fraudulent transfer thereof and because of failure of Chase to comply with the Bulk Sales Law of Idaho, in connection with such transfer; that her judgment should be declared to be a judgment against the assets of both Jesse M. Chase and Jesse M. Chase, Inc., and a judgment against Jesse M. Chase, Inc., as of the date of the entry of same, and that the sale from Chase the individual to the corporation be declared a fraud

upon appellee; that she is entitled to a judgment directing appellant to pay the balance due upon her judgment in the same manner as any and all other judgments against Jesse M. Chase, Inc., have been paid.

She prayed relief that appellant's case be dismissed; that the court decree that appellee's judgment to be at all times a valid lien upon the real estate in question, and a valid claim and judgment as of the date thereof against any and all assets and property standing in the name of either Jesse M. Chase, an individual, or Jesse M. Chase, Inc., the corporation; that it be declared a judgment against Jesse M. Chase, Inc., and that the Receiver be required to recognize and pay said judgment the same as any and all other judgments against said corporation have been recognized and paid, and for such other relief as may seem to the court just and proper.

QUESTIONS INVOLVED.

1. Where an individual, while solvent and no fraudulent intent is involved, transfers his property to a corporation which he has formed in consideration of the issuance to him of its capital stock, and others make bona fide investments of \$29,900.00 in preferred and common stock of said corporation in the meantime, and the corporation operates at a profit for one year after said transfer and incurs debts and liabilities in the ordinary course of trade, and a judgment is obtained 2 years and 9 months after such transfer by a creditor upon a pre-existing debt of the transferrer individual assumed by the transferee corporation, is such judgment, of itself,

effective as against the corporation and its property, without the transferee corporation having been made a party to the suit in which it was obtained?

This question is raised by the pleadings, the evidence, and the decision of the court.

2. Where a redemption is made of real estate by an assignee of the right of redemption, for value, will a deficiency judgment remaining after the sale, be restored as a lien upon said property?

This question is raised by the second affirmative defense of appellee (p. 15), and becomes material only in the event this court concludes that the first question should be answered in the affirmative.

SPECIFICATION OF ERRORS.

I.

The trial court erred in entering judgment for appellee for each of the following reasons:

(a) that appellee's answer, affirmative defenses, and counterclaim do not state facts sufficient to constitute a defense to appellant's amended complaint, or to state a cause of action as a counterclaim;

(b) that the evidence is insufficient to constitute a defense to appellant's amended complaint or to support appellee's counter claim;

(c) that the findings of fact are insufficient to support the judgment, and

(d) that the judgment is contrary to both the law and the evidence.

II.

The trial court erred in finding in its Memorandum Decision (p. 18, 19, 20).

“That he (Jesse M. Chase) was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it.”

for the reason and upon the ground that it is contrary to the evidence.

III.

The trial court erred in making each of the following findings of fact:

(b) All of finding of Fact IV.

(b) That portion of Finding of Fact V (p. 23, 24) reading as follows:

“* * * the said corporation was organized solely for the benefit of the said Jesse M. Chase; that he was,

for all practical purposes the sole and only owner of all of the corporation stock of said corporation, all of the corporate stock of said corporation, having used the names of a few of his employees in the incorporation of Jesse M. Chase, Inc. solely in order to comply with the corporation laws of the State of Idaho, and there was no consideration for the transfer of the assets of Jesse M. Chase, an individual to Jesse M. Chase, Inc., a corporation, and that insofar as the rights of Jesse M. Chase, Inc., and of the defendant herein were concerned, the said Jesse M. Chase remained the owner of the assets transferred to Jesse M. Chase, Inc., and the said corporation held the assets in trust for the payment of defendant's claim."

(c) That portion of Finding of Fact VI (p. 24) reading as follows:

"* * * that the transfer of all of the assets of Jesse M. Chase used in and about the used car business operated by him to said corporation in exchange for corporate stock, issued to said Jesse M. Chase, was a fraud upon the defendant herein,"

(d) That portion of Finding of Fact VI (p. 25) reading as follows:

"* * * that said Jesse M. Chase, Inc., took and accepted the real estate described in plaintiff's Amended Complaint and all of the assets, real and personal transferred to it by Jesse M. Chase, an individual as Trustee for the benefit of this defendant, and that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry was, and is a valid

lien upon the real estate in plaintiff's amended complaint referred to."

(e) All of Finding of Fact IX. (p. 26) .

(f) That portion of Finding of Fact X (p. 26) reading as follows:

"That the said plaintiff herein, the Receiver of Jesse M. Chase, Inc., took over and accepted the real estate described in plaintiff's amended complaint, and took over and accepted any and all other assets of the said corporation, subject to the judgment of Louise B. Musselman Sisil, and against Jesse M. Chase, an individual as aforesaid, * * *"

(g) That portion of Finding of Fact X (p. 26) reading as follows:

"* * * and that Louise B. Musselman Sisil is entitled to a judgment and decree directing the plaintiff to make payment of any balance due upon her judgment as aforesaid, in the same manner as any and all other judgments entered against Jesse M. Chase, Inc., have been paid by said Receiver."

(h) That portion of Finding of Fact XI (p. 27) reading as follows:

"* * * and that upon the filing and recording of said abstract of judgment the same became and was a lien upon all of the assets of Jesse M. Chase, Inc., a corporation in accordance with the laws of the state of Idaho."

for the reason that each and all of them are conclusions of law, are unsupported by the evidence, and are contrary to the law and the evidence in the case.

IV.

The trial court erred in making finding of fact VII (p. 25) for the reason that the facts therein found are immaterial, and, in no way constitute a defense or contribute to constituting a defense to appellant's amended complaint, and for the further reason that the same are conclusions of law, not supported by the evidence.

V.

The trial court erred in making Finding of Fact No. VIII (p. 26) for the reason that the facts as found therein or any of them, do not in any way constitute a defense, or contribute to constituting a defense to plaintiff's amended complaint, and are immaterial.

VI.

The trial court erred in making Finding of Fact XII (p. 27) for the reason that the same is a conclusion of law, contrary to both the evidence and the law.

VII.

The trial court erred in making Conclusions of Law Numbered I, II, III, IV, V and VI (p. 27, 28, 29) for the reason that there is no evidence in the record to sustain same, and that each and all of them are contrary to law, and to the evidence.

VIII.

The trial court erred in not entering judgment for appellant as prayed in his complaint for the reason that the evidence establishes a prima facie case for appellant, and there is no evidence in the record sufficient to constitute a defense thereto.

SUMMARY OF ARGUMENT.

Appellee had the option of bringing suit on her "Investment Certificates" against either Chase, the individual, without joining the corporation;

Or against Jesse M. Chase, Inc., the corporation (without joining Chase, the individual,) upon its agreement assuming payment of same,

Or, she could have sued both.

She elected to sue Chase the individual and obtained judgment against him only. Now she tries to subject the corporation property to payment of the judgment by summarily levying upon same and selling it as though it were the property of Chase, the individual.

Appellant takes the position that the transfer from Chase to the corporation was a bona fide transaction, free from fraud, or any other element which would hinder or delay creditors, for the reason that at the time Chase was solvent in the sum of \$175, 377.53 (Plaintiff's Exhibit 11) and further that as part of the consideration for the transfer the transferee corporation assumed payment of all debts of Chase in con-

ection with the business and property transferred, including appellee's.

It is not appellant's contention that the Jesse M. Chase, Inc., corporation is not obligated upon the debt to appellee upon the "Investment Certificates" (p. 46), but that so far as the corporation, Jesse M. Chase, Inc., is concerned that the obligation remains in the position of an unsecured claim against it, because the judgment did not run against it, by reason of not having been made a party to the suit.

In support of his position appellant relies upon the following statement of the law from 85 A. L. R. Annotation at page 140, as a concise statement of the law applicable to this case:

"Where the only circumstance relied upon as furnishing the intent to delay or defraud creditors is the fact that the debtor transferred his property to a corporation in consideration of its stock, many courts have refused to declare the transaction fraudulent as having been entered into with intent to delay and defraud creditors, or one without consideration. Such transfers are sustained, in the absence of any actual intent to delay or defraud creditors, which must be deduced from circumstances other than the mere transfer of stock." 85 A. L. R. 140.

Bennett v. Minot, 28 Ore. 339, 39 Pac. 997, 44 Pac. 288.

Re Braus, 248 Fed. 55, 40 Am. Bankr. Rep. 668.

Brill v. W. B. Foshay Co., 65 Fed. (2d) 420.

Bristol Bank & Tr. Co. v. Jonesboro Banking & Tr. Co. 101 Tenn. 545, 48 S. W. 228.

Byrne & N. Dry Goods Co. v. Willis Dunn Co., 23 S. D. 221, 121 N. W. 620, 29 L. R. A. (N.S.) 589.

Carson v. Long-Bell Lumber Corp. 73 Fed. (2d) 397.

Coaldale Coal Co. v. State Bank, 142 Pa. 288, 21 Atl. 811.

Gardner v. Haines, 19 S. D. 514, 104 N. W. 244.

Jordan v. Lynch Land Co., 83 Ind. Ap. 33, 147 N. E. 318.

Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

Kessler v. Levy, 11 Misc. 275, 32 N.Y. Supp. 260, 147 N. Y. 700, 42 N. E. 723.

Kingman v. Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169.

Marine Nat. Bank v. Swigart, 262 Fed. 854, 45 Am. Bankr. Rep. 162.

Maskell v. Alexander, 100 Wash. 16, 170 Pac. 350, L. R. A. 1918C 929.

Persee & V. Paper Works v. Willett, 19 Abb. Pr. (N.Y.) 416, 1 Robt. 131.

Plaut v. Billings-Drew Co., 127 Mich. 11, 86 N. W. 399.

Sayers v. Texas Land & Mortgage Co., 78 Tex. 244, 14 S. W. 578.

Scheck v. Bowne, 113 N. J. 51, 166 A. 189.

Skinner v. Southern Gro. Co., 174 Ala. 359, 56 So. 916.

Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098.

Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441.

Sunderlin v. Terry, 95 Conn. 713, 112 Atl. 642.

Thorpe v. Pennock Merc. Co., 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 299.

"Where no fraudulent intent taints the transaction, a debtor may transfer his property to a corporation, which he has formed, in consideration of the issuance to him of its capital stock, and of that his creditors cannot complain. *The capital stock is as available for the satisfaction of the claim of creditors after the transfer of the merchandise as the merchandise was before.*" (Italics supplied). *Maskell v. Alexander, supra*,

Coaldale Coal Co. v. National State Bank, *supra*,

"To organize a personal business into a corporation is altogether too common to raise any presumption of fraud." *Sunderlin v. Terry, Supra*.

A Corporation is an entity distinct from its stockholders.

34 A. L. R. 597 Annotation and cases therein cited.

1 A. L. R. 610 Annotation and cases therein cited.

The Idaho Bulk Sales Law, Idaho Code Sections 64-701-thru 64-705 is not applicable to transfers of real estate.

"I.C. Sec. 64-702—Whenever any person shall bargain for the purchase in bulk of any portion of stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, furniture, fixtures, equipment or supplies of a hotel or restaurant, barber shop or other place of business wherein the furniture, fixtures, and equipment are used in carrying on said business, otherwise than in the regular course of trade, for cash or on credit * * * *"

Transfer of stock in trade to corporation for its capital stock does not require compliance with Bulk Sales Law.

"A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit." *Maskell v. Alexander, supra.*

The burden is on the attacking party to show intent to defraud.

Rogers vs. Boise Ass'n. of Credit Men, 33 Idaho 513, 196 Pac. 213, 23 A. L. R. 195.

Redemption by Successor in interest takes redeemed property from the lien.

"One acquiring title, before expiration of period of redemption from original sale, took land free from lien of original judgment under which it was sold."
Evans v. City of American Falls, 52 Idaho 7, 11 Pac. (2d) 363.

ARGUMENT.

Specifications I, II, III.

The trial court erred in entering judgment for appellee for the reason that appellee's answer, affirmative defenses, and counterclaim do not state facts sufficient to constitute a defense to appellant's amended complaint, or to state a cause of action as a counterclaim.

We first call attention to the part of the answer preceding the first affirmative defense (p. 12, 13), and we find that the appellee has admitted that title is in the Jesse M. Chase, Inc., corporation, and then alleges only the conclusion of law that the said property was owned by Jesse M. Chase an individual, "*and if not owned by said Jesse M. Chase, is held in trust by the said corporation for the payment of the debts of said corporation*" without alleging any facts by way of fraud or otherwise on which to base such conclusion. (Italics supplied)

The allegations in the first affirmative defense eliminate the possibility of any fraud in the transfer of the property from Chase to the corporation, by averring:

“that the said Jesse M. Chase transferred all of his assets * * * without any consideration whatever except for the issuance of corporate stock * * *”

“that said corporation assumed the payment of certain Investors Certificates outstanding and signed by Jesse M. Chase, an individual, and agreed to pay the same; that the defendant herein was the owner of such Investors Certificates and the judgment heretofore referred to was rendered in her favor in a suit upon such certificates.”

without any allegation that said Chase was at the time of said transfer insolvent, or alleging any facts showing that such transfer hindered, delayed or defrauded her.

The second affirmative defense (p. 15, 16) does not state facts sufficient to constitute a defense for the reason that the acts therein alleged appearing on the face of same, occurred after the filing of the amended complaint. This redemption (Exhibit “4”) created a new source of title for the Receiver, derived from whatever interest Chase, the Individual, may have had in said property, as the assignment of the right of redemption came directly from Chase to the Receiver as well as the quit claim deed. This was all after the issues in this case had been framed, and we believe that it would constitute an entirely new cause of action in favor of the appellant, which could only be tried out on a new action based upon his acquisition of title from the different source.

Appellee certainly could not claim that a transfer of title from Chase and wife of the property in question, could be

any fraud upon her, after she had already attempted to sell all his right, title and interest in it, on execution of her judgment.

Under the circumstances the Receiver stands in the position of a bona fide redemptioner, deriving his right of redemption, from the party whose right, title, and interest, if any, and appellant contends there was none) was sold at the execution sale.

The case of *EVANS V. CITY OF AMERICAN FALLS*, 62 Idaho 7, 11 Pac. (2d) 363, has definitely settled this question by holding:

"One acquiring title, before expiration of period of redemption from original sale, took land free from lien of original judgment under which it was sold."

Therefore, it is our position, that in the first place these facts having occurred after the case was at issue, have no bearing on this case, and secondly, that if they do, under the authority cited, the facts clearly show title restored to appellant free from any lien of the judgment. The appellee made her own decision to evaluate the equity of Chase in the property at the amount of her bid, and, should not now be heard to complain that she lost her right to a lien of the deficiency judgment. (This, is assuming that Chase had an interest in the property, which we do not admit.)

The counter claim (p. 16) alleges the false conclusions that the judgment in case 1539 is *res adjudicata* as to the

appellant and as to Jesse M. Chase, Inc., and that said judgment was in fact a judgment against Jesse M. Chase, Inc., but at the same time eliminates such statements as facts by alleging that in said case 1539 Louise B. Musselman Sisil was plaintiff and Jesse M. Chase was defendant, without alleging that the corporation, Jesse M. Chase, Inc., was a party defendant to said suit, which it was not.

The allegations therein pertaining to non-compliance with the Bulk Sales Law of Idaho, in no way contribute to a valid defense, or toward stating a cause of action on counterclaim.

In the first place the Bulk Sales laws of Idaho are not applicable to transfers of real estate. Sections 64-701 through 64-705 of the Idaho Code. Under our Summary of Argument page 20 of this brief, is set forth the material portion of said statutes, to-wit: Sec. 64-702.

Also the better line of decided cases on this point, hold that such a compliance is not necessary with regard to stock in trade and other personalty included in the Bulk Sale Act.

“A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit.” *Maskell v. Alexander*, supra, 170 P. 350, L. R. A. 1918C, 929.

Appellee in preparing her defense must have been relying upon a presumption that a transfer by an individual of his

sets to a corporation in exchange for stock is, of itself, fraudulent.

"The good-faith transfer of property to a corporation, even though organized for that purpose, in exchange for its capital stock, is not per se fraudulent, at least unless such transfer has the effect of hindering and delaying creditors. The stock stands in place of the property and is subject to execution." *Carson v. Long-Bell Lumber Corporation*, 73 Fed. (2d) 397, 402. Citing the following cases:

Gardner v. Haines, *supra*.

Shumacker v. Davidson, *supra*.

Plaut v. Billings-Drew Co., *supra*.

Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098.

Sayers v. Texas Land & Mortgage Co., *supra*.

Bristol Bank & Tr. Co. v. Jonesboro Banking & Tr. Co., *supra*.

Skinner v. Southern Gro. Co., 174 Ala. 359, 56 So. 916.

Scheck v. Bowne, 113 N. J. 51, 166 A. 189.

In re Braus (C. C. A. 2) 248 F. 55.

Brill v. W. B. Foshay Co. (C. C. A. 8) 65 F. (2d) 420.

The test as set forth in the above cases is, whether or not the transfer, hindered, delayed or defrauded creditors. In this case, the appellee has foreclosed herself from any such situation by alleging in her affirmative defense that the corporation assumed to pay her obligation, so that she had a right to proceed directly against the corporation, if she had so elected.

For the foregoing reasons, we submit that the appellee has not stated a valid defense to appellant's complaint.

The remaining portions of Specification of Error 1, to-wit:

(b) that the evidence is insufficient to constitute a defense to appellant's amended complaint or to support appellee's counter claim;

(b) that the findings of fact are insufficient to support the judgment, and

(d) that the judgment is contrary to both the law and the evidence, are all tied in with Assignments No. II, III, that it would cause this brief to be unnecessarily repetitious if we were to argue them singly at this point.

Taking up Assignment II that the trial court erred in finding in its Memorandum Decision (p. 18, 19, 20) that Chase "was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it": While this, in itself may constitute no official part of the record, it never-

ne-less is the basis for the findings of fact and conclusions of law which we have alleged as error, and for that reason we deem it essential to a proper determination of this case.

We assign as error that it is contrary to the evidence. The evidence, (Plaintiff's Exhibit 11), shows that at the time of the incorporation, that the individual, Chase, was in excellent financial circumstances, and we particularly call attention to the fact that said Exhibit, being the balance sheet on which said corporation was formed shows him with a net worth of \$175,377.53. We have carefully examined the record of testimony at the trial, and we find not a single word of evidence, that Chase was involved by reason of these certificates at the time he formed the corporation, or that he formed the corporation for that reason.

In Argument of that portion of Specification of Error II, that the court erred in making the finding in Finding IV, "that the transfer by Jesse M. Chase and wife to the said Jesse M. Chase, Inc., a corporation of the real estate heretofore and in plaintiff's amended complaint described was without consideration" that it is suffice to say that appellee's allegation in her affirmative defense (p. 12, 13) *that the consideration was "for the issuance of corporate stock" and that the corporation assumed the payment of certain Investors Certificates, and that she was the owner of such Investors Certificates,*" makes any further comment with regard thereto unnecessary. However, we do desire to call attention to the fact that Plaintiff's Exhibit "10" shows that this transfer was made in consideration of the issuance of stock, and for the further

consideration of the assumption of the payment of these Investment Certificates. Authorities heretofore cited amply cover this.

And as to that portion of finding of Fact V that "the said corporation was organized solely for the benefit of the said Jesse M. Chase; that he was, for all practical purposes the sole and only owner of all the corporation stock of said corporation, having used the names of a few of his employees, solely in order to comply with the corporation laws of the State of Idaho," is contrary to the evidence found in Defendant's Exhibit "5" and Plaintiff's Exhibit "8", and the evidence found in the printed record as testified to by the witness W. R. Hubble at pages 76 to 81.

As to the portion of said finding regarding lack of consideration,—this appears to be a repetition of a prior part of said finding, which we have discussed above.

With regard to the remaining portions of Specification III we feel that no particularly useful purpose can be served by here repeating the assignments, and pointing out, specifically the lack of evidence support them. We take it for granted that the Cour will carefully examine said specified errors, and read the transcript, and exhibits, and that it will be unable to find any evidence supporting any of the facts found.

However, the court will find that most of the so-called findings of fact are nothing but conclusions of law, and we feel that the court can capably judge their character without us having to call the same specifically to its attention.

That the findings are contrary to law, we respectfully refer the court to the authorities quoted and cited in our "SUMMARY OF ARGUMENT" at pages 17, 18, 19 of this brief.

SPECIFICATION OF ERROR IV.

That the court erred in making finding of fact VII (p. 7). We fail to see, how the appointment of the receiver can in any way affect appellee's claim to the real estate. She is relying upon a judgment entered on October 1, 1949, transcript of which was filed in the Recorder's office of Bannock County on October 15, 1949, and a levy made on the real estate in question pursuant to execution issued on said judgment on October 31, 1949. The receiver was appointed and qualified on November 5, 1949. It seems to us that she must either stand or fall upon the effectiveness of this judgment, and the subsequent levy and sale thereon after levy of execution, especially in view of the Findings of Fact preceding this one, to wit, Finding VI, (p.25) "* * * that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry, was and is a valid lien upon the real estate in plaintiff's amended complaint referred to."

After all this is a suit to determine conflicting claims to real estate, and by her pleadings, and by her findings, appellee is relying upon this judgment obtained by her in case No. 1539, as her claim to a superior right to the real estate over the appellant, and again, we call attention to the fact that said judgment was obtained more than a month before the Re-

ceiver was appointed and qualified, and, her levy of execution on the real estate, preceded his appointment.

SPECIFICATION OF ERROR V.

In Finding of Fact VIII the court finds that at the time of the transfer of all of the assets, both personal and real, of his used car business to Jesse M. Chase, Inc., Jesse M. Chase, gave no notice of said transfer to the defendant herein as a creditor, and made no attempt or effort to comply with the Bulk Sales Act of the State of Idaho.

No notice is necessary and in support of this statement we respectfully refer the court to the cases cited in our SUMMARY OF ARGUMENT, pages 17, 18, 19 of this brief.

The Bulk Sales Act of the State of Idaho, does not embrace the transfer of real estate. Idaho Code Section 64-702. See SUMMARY OF ARGUMENT, page 20 of this brief for quotation of material part of said code section.

“A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit.”

Maskell v. Alexander, *supra*, 170 Pac. 350, L.R.A. 1918C 929.

SPECIFICATION OF ERROR VI.

Our objection to this finding is the use of the word “sold”. We believe we have conclusively established to the

satisfaction of the court, that the real estate could not be legally sold, because it was the property of the Jesse M. Chase, Inc., corporation, at the time of the entry of judgment and entry of execution, and that hence any attempted sale was a nullity.

SPECIFICATION OF ERROR VII.

This is to the effect that all the conclusions of law (p. 27, 28, 29) made by the Court are error for the reason that there is no evidence in the record to sustain them, and that each and every one of them are contrary to law, and to the evidence. Again, we take the position that we feel that we would not be particularly helpful to the court by repetitiously going over the evidence, and pleadings, as we again assume that the court, will examine the record, and that upon such examination, it will find no evidence to sustain these conclusions.

In support of our position that they are contrary to law, we again refer the court to the authorities cited in our SUMMARY OF ARGUMENT, on pages 17, 18, 19 of this brief.

SPECIFICATION OF ERROR VIII.

We set forth as error in this specification that the trial court erred in not entering judgment for the appellant as prayed in his complaint. The appellant made a prima facie case (p. 36-40) (Plaintiff's Exhibits 1, 2, 3, 4). We believe we have pointed out that the appellee made no defense either by her pleadings or by the evidence submitted, and as

for the law in the matter, we again refer to the authorities cited in our SUMMARY OF ARGUMENT on pages 17, 18, 19 of this brief.

CONCLUSION.

In conclusion, we respectfully submit that, upon the record and the law as applied to the same that the judgment entered in the District Court should be reversed and the cause remanded to said court with instructions to enter judgment as prayed in appellant's complaint, with costs awarded to appellant.

Respectfully submitted,

F. M. BISTLINE

R. DON BISTLINE,

Attorneys for Appellant.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District
of Idaho, Eastern Division.

F. M. BISTLINE

Pocatello, Idaho

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FILED

FEB 14 1951

PAUL P. O'BRIEN

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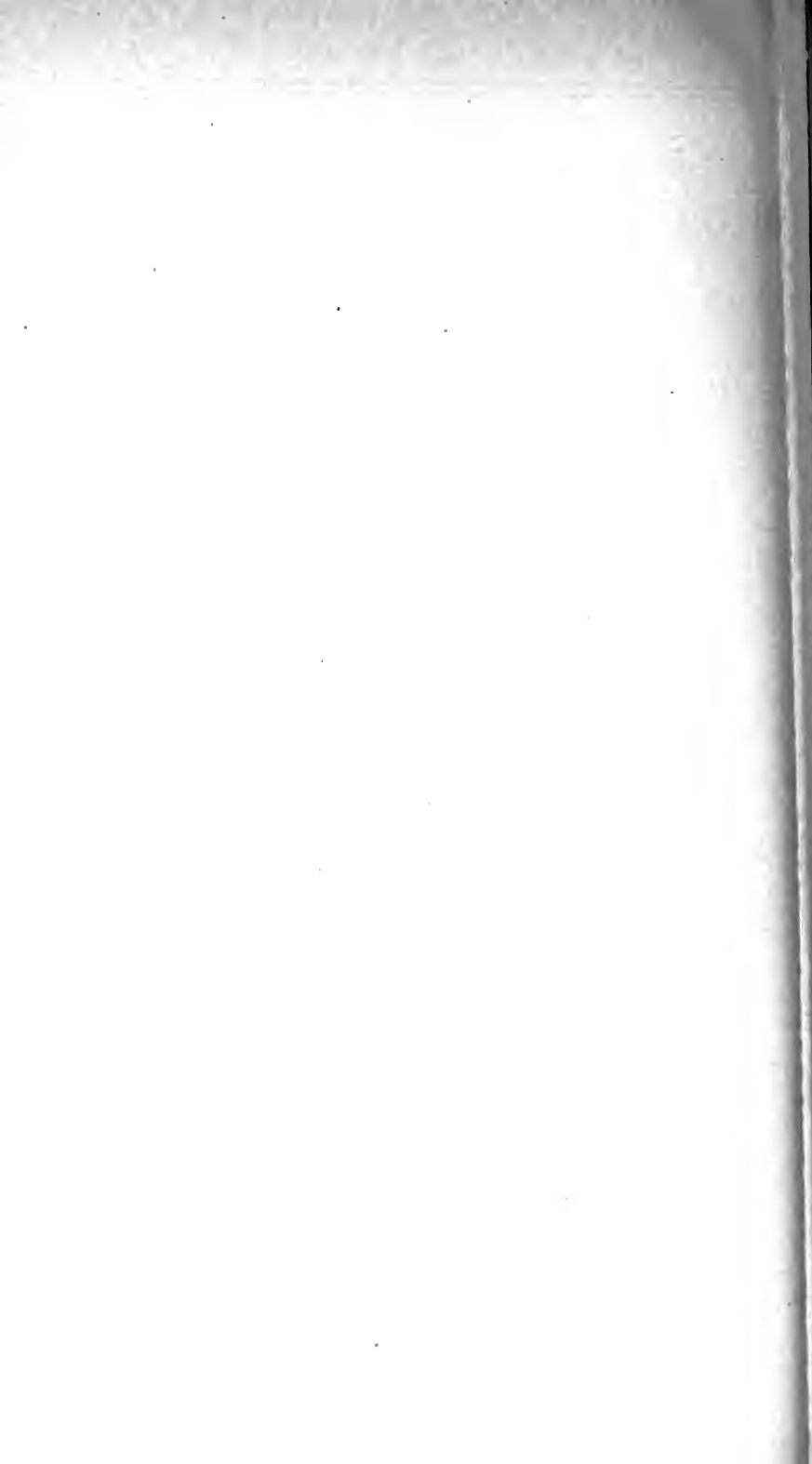
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IN THE
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Appellee.

Brief of Appellee

STATEMENT OF FACTS

The appellant, as receiver for Jesse M. Chase, Inc., first commenced an action in the State Court in Bannock County, against Everett M. Evans, United States Marshal and Louise B. Sisil, to restrain the sale of certain real estate described in the appellant's complaint, by the United States Marshal. This, the application for an injunction or restraining order was denied by the District Judge.

At the time the application for injunction was presented, the appellee herein had not been served with summons. After the refusal of the State Court to enjoin the United States Marshal, plaintiff amended its complaint dropping the Marshal as a party and made service upon Mrs. Sisil (Tr. pp. 41-42).

It developed during the trial of the case that the appellant herein, after the commencement of the action to quiet title to the real estate described in his complaint, sold and transferred by warranty deed, all of his interest in and to the real estate, to C. C. Anderson Company, a corporation of Idaho. This matter is referred to repeatedly in the testimony. (Pages 82, 83 and 84).

The trial Judge's Finding of Fact No. XII, page 27, found:

"That the plaintiff herein, subsequent to the rendition and entry of the judgment in favor of Louise B. Musselman Sisil and against Jesse M. Chase in Case 1539 as aforesaid and subsequent to the filing and recording of an abstract of said judgment in the office of the County Recorder of Bannock County, Idaho, sold the real estate described in plaintiff's amended complaint."

No objection is made as to this Finding except in No. 6 of the Statement of Points found on Page 103, it is stated:

"The trial court erred in making Finding of Fact XII for the reason that same is a conclusion of law, contrary to both the evidence and the law."

The appellant offered in evidence portion of an abstract of title, plaintiff's Exhibit No. "4", supplemental abstract of title. Page 39.

This exhibit is with the Clerk of the Circuit Court, counsel for appellee does not have a copy of the same but is advised by counsel for appellant and the abstractor who certified to

the same that the abstract shows conveyance of the real estate described in the complaint by warranty deed from Donald L. Burnett, receiver, as grantor, to C. C. Anderson Company of Caldwell, Idaho, an Idaho corporation, as grantee, on the 20th day of February, 1950, which deed was recorded February 21, 1950, being Instrument No. 271133, recorded in 1908 Book of Deeds at Page 90. The consideration is shown in the deed and the testimony in reference thereto and the finding of the Court establishes definitely and we are sure without any controversy that on May 2, 1950, when this case was tried, the appellant had no interest, legal or equitable in the real estate involved and no request or motion was at any time made for the substitution of C. C. Anderson Company as plaintiff or for permission to carry on the suit in the true owner's name.

The record also shows that Jesse M. Chase, Inc., transferred all of its interest in and to the real estate involved by a quitclaim deed to C. C. Anderson Company, which deed was dated February 20, 1950 and recorded February 21, 1950, being Instrument No. 271134.

It thus clearly appears that not only the receiver who was the receiver for Jesse M. Chase, Inc., transferred all of his interest as receiver, but that the corporation also for the purpose of satisfying the purchaser, transferred all of its interest and the exhibit also shows that Jesse M. Chase and his wife, as individuals, on February 8, 1950, by quitclaim deed transferred to Donald L. Burnett, as receiver, all of their interest in the real estate. This deed was recorded February 21, 1950. Regardless of whether the title at the time of the United States

Marshal's sale of the real estate by appellee, vested as a matter of law in Chase as an individual or Jesse M. Chase, Inc., both Chase and the corporation, in February of 1950, transferred all their interest in and to the property.

When the title insurance had been issued to the C. C. Anderson Company, the entire matter was consummated on February 21, 1950, and all of the quitclaim deeds and the warranty deed to C. C. Anderson Company were recorded at the same time, being Instrument Nos. 271131 to 271134, inclusive.

Exhibit "14" is a transcript of evidence taken in the State Court upon the application of one Youngren, plaintiff versus Jesse M. Chase, Inc., for the appointment of the receiver and is directly referred to in the testimony of witness Chase, pages 64-65 and in that action, the corporation did not file any answer or pleading whatever in reply to the complaint asking for a receiver and the witness Chase appeared voluntarily at the hearing and strenuously urged the appointment of the receiver. The proceedings and his testimony, as shown by Exhibit "14" and the entire record, not only in that case but in the instant case, show that Jesse M. Chase was the instigator of the action filed for the appointment of a receiver and testified directly that he was insolvent, that he had nothing with which to pay any obligations and also testified in the instant case that Jesse M. Chase, Inc., owed and was obligated for the judgment entered in favor of Mrs. Sisil, the appellee in case 1539 and the corporation should pay the same. (Page 70.)

Testimony: "Q. the judgment, of course, is an obligation of the corporation just as much as any other obligation the corporation has? A. That is right."

After the appointment of the original receiver, Mr. Hilgard, Jesse M. Chase made a report, defendant's Exhibit "6", under date of November 17, 1949, in which he said:

Coment: "It is my personal opinion that a receiver is necessary to liquidate the affairs of Jesse M. Chase, Inc., in order to make a fair and equitable distribution to all classes of cases".

This report, Exhibit "6", purports to set fourth the assets of Jesse M. Chase, Inc., and its liability and in the same report is found the following:

"Judgment Creditors". Under the heading of "Judgment Creditors", on page 6 is the following statement: "Louise B. Musselman Sisil, Judgment in U. S. District Court on Investment Certificates.....\$; United States Marshal's Execution Sale set for November 26, 1949—Judgment against Jesse M. Chase, attachment and execution against property owned by Jesse M. Chase, Inc."

At the close of testimony by the appellee application was made (page 75) for permission to amend the defendant's answer by pleading affirmatively. The appellant objected to the amendment unless given an opportunity to defend against the same.

"The Court: The amendment will be allowed and you will be permitted to offer any defense you desire."

The Court rendered a Memorandum Decision on the 2nd day of August, 1950 and thereafter made Findings of Fact

and Conclusions of Law and entered Judgment in favor of the appellee as heretofore referred to. By Finding No. XII, the Court found that the plaintiff, appellant herein, had sold the real estate described in the amended complaint and also found that the appellee had established her defense and that the lien of the appellee, in what is referred to as Case No. 1539 in the Federal District Court, was a lien upon the real estate standing in the name of Jesse M. Chase, Inc., the corporation standing in the shoes of Jesse M. Chase, an individual, who had organized the corporation entirely for his own benefit and who, with the exception of qualifying shares of stock issued to his employees, owned at all times at least Seventeen Hundred Sixteen (1716) shares of the common stock of the corporation with only Seventeen Hundred Fifty-nine (1759) issued and outstanding.

It is thought that a further recital of the facts is not necessary in view of the record.

SUMMARY OF APPELLEE'S POSITION

The legal principles involved are not unusual or particularly complicated but because of the fact that other proceedings are referred to and were referred to at the trial of the case by the different parties and the fact that proceedings in both the State and Federal Court in other actions entered into the facts, the record is not as smooth or satisfactory as it could be. However, the matter follows the general pattern in this type of cases.

The appellee contends that, at the time of the trial, the proceedings show definitely by the appellant's testimony that

the appellant was not the real party in interest; that he had divested himself entirely of any title and that the case could not proceed successfully insofar as the appellant's complaint was concerned without either a substitution of party or an application on behalf of the C. C. Anderson Company, the owner; that the proceeding be carried on in its name, it of course, being obvious that C. C. Anderson Company insisted upon the issuance of title insurance to it and that being fully protected, it did not and does not desire to be a party to this litigation. Rule 17A of Federal Rules of Civil Procedure. (Hereinafter copied at length).

When the facts disclosed at the time of the trial that C. C. Anderson Company, for the sum of Eighty Thousand Dollars (\$80,000), had purchased the real estate, it immediately became apparent that C. C. Anderson Company was an indispensable party and that suit could not proceed. Rule 19A, Federal Rules of Civil Procedure. (Hereinafter copied at length).

The receiver of Jesse M. Chase, Inc., can not claim any greater or other title than the corporation itself holds or could claim and one seeking to quiet title can assert no stronger claim than his predecessor in interest and receiver can not have any stronger claim than the party for whom he is acting as receiver.

The appellee having recovered a judgment against Jesse M. Chase and contending that any transfer of title to Jesse M. Chase, Inc., a corporation formed and owned for his benefit was fraudulent as to creditors and fraudulent as to her, could

proceed with a direct sale of real estate standing in the name of the corporation without taking any other action.

The attempted sale and transfer by Jesse M. Chase to the corporation, organized solely by him for his own benefit under the circumstances and conditions shown by the record was a direct fraud upon the appellee.

The attempted sale and transfer of the assets of Jesse M. Chase to Jesse M. Chase, Inc., when practically all of the assets were personal property and where a business consisting generally of the sale of used cars and parts and his assets were almost totally made up of used car parts and equipment without complying with the Bulk Sales Act of Idaho, was fraudulent and void as to his creditors.

ARGUMENT

I.

THE APPELLANT IS NOT AND NEVER WAS, SUBSEQUENT TO THE 20TH DAY OF FEBRUARY, 1950, THE REAL PARTY IN INTEREST AND THE C. C. ANDERSON COMPANY, THE OWNER AND HOLDER OF THE TITLE TO THE REAL ESTATE DESCRIBED IN PLAINTIFF'S AMENDED COMPLAINT, WAS AT ALL TIMES ON AND AFTER THE 20TH DAY OF FEBRUARY, 1950, AN INDISPENSABLE PARTY.

Rule 17 of the Rules of Civil Procedure, Sub-division A. is as follows:

“(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest:

but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Section 5-301, Idaho Code, provides:

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code."

There is no difference or distinction between the Idaho Statute and the Rules of Civil Procedure so far as the requirements that an action be prosecuted by a real party in interest. The Supreme Court of Idaho in the case of Carrington vs. Crandall, 63 Idaho 651, 124 Pac. 2d 914, has passed upon the question raised by appellee in an action where the facts are so similar that the decision certainly is entitled to great weight. The Supreme Court in this action decided that where a plaintiff commenced an action to quiet title to real estate and thereafter by warranty deed transferred the title to a third party prior to the trial of the case, that in the absence of a request of the true owner, either to be substituted or to permit the original plaintiff to proceed with the action, could not be maintained and that a plaintiff that transferred its interest in the real estate by absolute deed during the pendency of the action was not the "real party in interest".

In the case of New Rawson Corporation versus the United States, 55 Federal Supplement 291, it was held directly that

where a receiver had sold real estate to a third party, that the third party or grantee is the real party in interest and that suit should be filed in the grantee's name and not that of the original owner or receiver.

It was held in *Stern Agency, Inc., et al vs. Mutual Benefit Health and Accident Insurance Company*, 43 Federal Supplement 167, that one who has assigned a claim or his interest and has no interest or ownership is not the real party in interest and cannot maintain a suit. The reasoning in this case and the authorities cited are applicable to the question here raised.

Sub-division A of Rule 19 of the Rules of Civil Procedure, provides:

“(a) *Necessary Joinder*. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.”

The C. C. Anderson Company, being the owner under a warranty deed and the record showing the payment of the sum of Eighty Thousand Dollars (\$80,000) for the property, was certainly an indispensable party in an action to quiet title and any decision by the Court as to the title would directly and adversely affect their title.

“No Court can adjudicate directly upon a person's right, without the party being actually or constructively before the Court.” *Mallow vs. Hinde*, 12

Wheat 193, 6 L. Ed. 599; Shields vs. Harrow, 17 Howard, 130, 15 L. Ed., 158.

It is appellee's belief that the reported case of *State of Washington vs. United States*, 87 Federal 2d, 421 in the Ninth Circuit is determinative of this question. As the State of Washington, the owner of the real estate in that action was an indispensable party in an action brought by the United States Government where the State of Washington was not made a party, then it must follow that the C. C. Anderson Company is and was an indispensable party in the present action.

Even if the trial Court had been convinced that the appellee's judgment was not a lien upon the real estate, what form or nature of decree could he have entered without the C. C. Anderson Company being a party? Certainly the receiver, after having made this advantageous sale which he explained at length on the witness stand and having accepted the money, had no further interest in the matter and it is amply disclosed by the record and by Exhibit "4" that the purchaser C. C. Anderson Company was not willing to rely upon a redemption but that in addition to the assignment of the right of redemption required that Jesse M. Chase and his wife give a quitclaim deed to the receiver and also that Jesse M. Chase, Inc., give a quitclaim deed to the purchaser. The appellant in his statement of facts on page 7 of his brief makes this statement: "He went through the motions of a redemption."

II.

THE RECEIVER STANDS IN THE SHOES OF JESSE M. CHASE, INC., AND CERTAINLY CANNOT CLAIM ANY BETTER TITLE THAN THE CORPORATION.

The rule is elemental that the receiver cannot have any stronger claim than the debtor whom the receiver represents and that he cannot assert any stronger claim than his predecessor in interest. *Moore, et al. vs. Boise Land and Orchard Company, Ltd.*, 31 Idaho 390, 173 Pac. 117.

III.

A JUDGEMENT CREDITOR CLAIMING THAT A TRANSFER OF PROPERTY TO A THIRD PERSON IS FRAUDULENT AS TO CREDITORS COULD PROCEED WITH A DIRECT SALE OF THE REAL ESTATE.

The appellee was entirely within her rights and proceeded exactly in accord with a recognized rule of law and decisions in levying directly upon the real estate transfer by *Jesse M. Chase, an individual*, to *Jesse M. Chase, Inc.*

The general rules as laid down in 12 Ruling Case Law, Section 126, pages 615-616 and Section 127, pages 619-620, is supported by the great weight of authority and really requires no further citation. However, this procedure was recognized in *The Mode, Ltd. vs. Myers*, 30 Idaho 159, 164 Pac. 91. The case of *Shapiro vs. Wilgus*, decided by the United States Supreme Court, 287 U. S. 348, 53 S. Ct. 142,

7 L. Ed. 355 wherein the Circuit Court of Appeals was reversed was reported and digested with an exhaustive note in 5 ALR 198.

This case is nearly in point on the facts, the only difference between the instant case and the Shapiro case is that judgment had been secured against the individual before he formed his corporation. In the instant case the forming of the corporation and the transfer of the debtor's assets clearly was an attempt to place all of the assets beyond the power of his creditors to levy on them. He had nothing left and in addition was the prime mover in the appointment of the receiver; his actions were so nearly those of the debtor in the Shapiro case as to be unusual. In the instant case, the Jesse M. Chase, Inc., did not even take the trouble to answer or to file any pleading whatever and Jesse M. Chase, the President of the corporation, appeared at the hearing without any answer having been filed, either protesting the appointment of a receiver or agreeing to it, and he testified at length in opposition to the appellee's objection to the appointment of a receiver. As pointed out in the Shapiro case, this amounted to an absolute fraud in itself.

Supporting the right of the appellee to proceed as she did the following cases are cited:

Allen v. McGee et al (Cal.) 129 P. 2d 143.

Smith vs. Reid, (N. Y.) 31 N. E. 1082.

(Vernon's Ann. Civ. St. art. 3996.—Colburn vs. Ward, 40 S. W. (2d) 878.

"Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer for value, of the same property, or the rents or profits thereof." 55-901 Idaho Code.

"Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtors." 55-906 Idaho Code.

Old Honest Oil Co. vs. Shuler, 11 F. (2d) 176, reversed (C. C. A.) Shuler vs. Old Honest Oil Co., 18 F. (2d) 894, certiorari denied—Old Honest Oil Co. vs. Shuler, 48 S. Ct. 115, 275 U. S. 553, 72 L. Ed. 422.

(Civ. Code, pp. 3442). Allee vs. Shay, 268 P. 962, 92 Cal. App. 749.

Bank of Wrightsville vs. Powell, 135 S. E. 922, 163 Ga. 291.

Varn Inv. Co. v. Bankers' Trust Co., 141 S. E. 900, 165 Ga. 694.

Lambert v. Reisman Co., 223 N. W. 541, 207 Iowa, 711.

Runyon v. Bevins, 291 S. W. 1033, 218 Ky. 589.

Carruth v. Jones, 139 So. 655.

Healy-Owen-Hartzell v. Montevideo Farmers' & Merchants' Elevator Co. 212 N. W. 455, 170 Minn. 290.

Swift & Co. v. 1st Nat. Bank, 168 A. 827, 114, N. J. Eq. 417.

Gillette v. Davis, 296 S. W. 658.

IV.

THE ATTEMPTED SALE AND TRANSFER BY JESSE M. CHASE TO A CORPORATION ORGANIZED SOLELY BY HIM FOR HIS OWN BENEFIT UNDER THE CIRCUMSTANCES SHOWN BY THE RECORD, WAS A DIRECT FRAUD UPON THE APPELLEE.

Appellee calls attention to the fact that it is argued in the appellant's brief that it was her duty to have joined Jesse M. Chase, Inc., as a party defendant when she filed her suit in Case No. 1539 in the Federal District Court. It must be borne in mind that the appellee at the time she filed her original suit, had no notice or knowledge of the machinations of Jesse M. Chase in transferring his property. Those facts came out in the trial and she did not recover her judgment until in October, 1949, and the record shows that she immediately caused a levy to be made upon the real estate. All of these facts and circumstances were before the trial Judge who was familiar with the entire proceedings.

The authorities are overwhelmingly in support of the proposition that an individual by the transfer of all of his assets to his own corporation can not place those assets beyond the levy of his creditors and that equity will not permit such a

proceeding. This is true even where the new corporation does not specifically assume the debts but in the instant case the corporation expressly assumed by a Minute Entry, a payment of the Investor's Certificates and we do not believe any case can be found where the indebtedness was expressly assumed that the corporation where it has all of the property, can through a receiver and through an action to quiet title, evade the judgment of the creditors simply on the ground that while the judgment creditor was entitled to judgment directly against the corporation that because the judgment was not so entered that the lien of the judgment creditor is avoided.

In the case of *Noll vs. Chattanooga Co. Ltd. et al* (Tenn.) 38 S. W. 287, there was a consolidation of two corporations. The original corporation transferred its assets to the new, and the new corporation assumed all of the indebtedness. At the time of the transfer there was an action pending against the original corporation. The case proceeded to judgment and the question before the Court was whether or not the judgment was in fact a judgment against the succeeding corporation.

Certainly there can be no difference whatever in the law principle involved in that case and the instant one. It could make no difference whether suit was pending on Mrs. Sisil's investment certificates when the transfer was made. The investment certificates were subject to suit and as the authorities cited will show notice to Chase or a suit against Chase, the President, was notice to the corporation.

We quote at some length from the *Noll* case for the rea-

on that it so directly answers appellant's contention.

"* * Respondent new company, further answering, repeats that it did not assume to pay any judgment that might be rendered against the said old company to which it was not a party, and does not now do so, and is not and will not be bound by any such judgment.

"* * Respondent, further answering, avers that, the said Noll being familiar with the fact of said assumption on its part, if he desired to hold it liable and accept said assumption, as he did and does, he should have made it a party to said original suit, so as to bind it by any judgment that might be rendered therein; but he failed to do so, and respondent insists in consequence thereof, and of the fraud and deception hereinbefore set out, and averred to have been practiced by him, it is not bound by said alleged judgment, and cannot be held liable to him on said assumption, except upon a direct suit upon said contract against it. * * * *

"Considering these facts in connection with the pleadings, it will thus be seen that, so far as concerns the question of the assumption of the debt by the new company, the only point of difference between the complainant and the defendant new company is whether the judgment can, in this state of the case, be used in evidence against the new company, to ascertain the amount assumed; or, to state it differently, whether the new company is liable to suit upon the judgment, or whether, in order to hold it liable upon the assumption, a suit must be brought upon the original cause of action. It would be very singular, and the result of a highly technical ruling, if under the circumstances, and considering the relations of the parties to the subject-matter, it should be held necessary for the parties to go over all this long and tedious litigation again. The defendant new company

took over all of the assets of the old company, and agreed to pay all of its debts. * * * *

“* * Before the new arrangement was made, the old company owned the property, and was liable for the debt, whatever its true amount might be. After the new arrangement, the new company owned the property, and became, by agreement, liable for the debt, whatever it might be. Meanwhile, the litigation already in existence when the new arrangement was undertaken proceeded for the ascertainment of the amount due. We think, under these circumstances, the old company should be treated as the agent or representative of the new company, for the conduct of the litigation and the ascertainment of the amount due; hence the parties would be in privity, and the judgment against the old company would be binding upon the new. *Herm. Estopp.* pp 137, 152. Again, stated differently, after the new arrangement was effected, the new company having all the assets of the old company, and having assumed all its debts, the old company was but a nominal party to the litigation. The real party in interest was the new company. 21 *Am. & Eng. Enc. Law*, p. 141, and note 3.”

On the question of whether or not the notice to Chase who was president of the corporation and the managing officer, being notice to and binding on the corporation, and that the suit against Chase was a suit against the corporation, see *Cowthra vs. Stuart*, 109 N. Y. S. 77.

We also call attention to the language of the Court in *James vs. Stokes*, (Ky.) 261 S. W. 868.

In discussing the identical position of the plaintiff here, the Court said:

“We have seen in this case that the evidence, in the light of the surrounding facts, proves a fraudulent

intent on the part of Stokes, the grantor, and on the assumption that there was a valuable consideration for the deed, then the question to be determined is whether the grantee, defendant Melvyn Realty Company, had knowledge of his fraudulent intent, which counsel for defense gravely insists was untrue. Their contention in that respect is to our minds so fallacious and unfounded as to embarrass us in an attempt to refute it. We are asked by counsel to hold that Stokes, as the sole and only stockholder in the corporation and the only one entitled to hold any office in it, did not know his intent and purpose as an individual dealing with himself as sole stockholder, which, if true, presents a puzzle more intricate and confusing than the proverbial Chinese one. It is so much so that we have determined to solve the question by holding that what Stokes individually knew he also knew as the sole owner of the corporation defendant."

As showing the position of the Idaho Court in matters of this kind, we call attention to the case of Seymour vs. Boise L. R. Co., Ltd., 24 Idaho 7, 132 P. 427. The syllabus in that case is as follows:

"Where a new corporation is formed by stockholders and directors of an existing corporation, and the directors of the new corporation are the same persons who were a majority of the directors of the old corporation, and 98 per cent of the issued stock of the new corporation is held by the same persons who were stockholders in the old corporation, and the new corporation purchases all the franchises and property of the old corporation and pays therefor in shares of the capital stock of the new corporation and in cash to the amount of 87½ per cent of the par value of \$150,000 worth of first mortgage bonds of the new corporation, HELD, that the transaction amounts in fact and law to a reorganization of the old corpora-

tion, and that the new corporation is liable for a judgment against the old corporation which was rendered for damages on account of personal injuries inflicted by the old corporation."

The same rule was observed in *Moore vs. Boise Land and Orchard Company, Ltd.*, 31 Idaho 390, 173 P. 117 where the court recognized where two corporations consolidated, that in the absence of any assumption of indebtedness by the new corporation or allegation of fraud or that the one was a continuation of the other, that there would not be any liability upon the newly formed corporation.

The case of *Tom O. Mason Co. vs. Pouse, et al.*, 227 N. W. 392, is squarely in point on the facts. The statute in Wisconsin, that is their statute of frauds, is very similar to the statute of frauds in Idaho. It contains a provision that the injured party could bring an action to set aside the fraud conveyance, but this merely stated a rule of equity and the case is directly in point.

The following authorities support the appellee's position:

Shapiro vs. Wilgus, supra.

Gillette, et al., vs. Davis, (Tex.) 296 S. W. 658.

Roberts vs. W. H. Hughes Co. (Vt.) 83 Atlantic 807.

12 Ruling Case Law, Section 12, Page 480.

Limitation of the Corporate Entity by Anderson
Sec. 72, 84, 132, 134 and 139.

Stanford Hotel Co. vs. M. Schwind Co., 180 Cal.
348, 180 Pac. 780.

Blanc vs. Paymaster Mining Company, 95 Cal.
524 30 Pac. 765.

V.

PRACTICALLY ALL OF THE ASSETS OF JESSE M. CHASE, BEING PERSONAL PROPERTY, ANY SALE AND TRANSFER OF THE SAME WAS SUBJECT TO THE BULK SALES ACT OF IDAHO.

The appellant argues that the sale of the Jesse M. Chase enterprises to Jesse M. Chase, Inc., was a valid, bona fide sale. If the appellant had established this to the satisfaction of the trial Court or should establish it to the satisfaction of this Court, then he would bring himself squarely within the provisions of the Idaho Code with reference to the Bulk Sales Act, Sections 64-701, 64-702 and 64-705.

"64-701. Vendor to make statement of indebtedness.
It shall be the duty of every person who shall bargain for or purchase any portion of the stock of goods, wares or merchandise in bulk, or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk for cash or on credit or any portion of the property, furniture, fixtures, or equipment or supplies of a hotel, restaurant, barber shop or any place of business wherein the furniture, fixtures, or equipment are used in carrying on said business, otherwise than in the regular course of trade before paying to the vendor or his agent or representative or delivering to the vendor or

his agent or representative any part of the purchase price thereof, or any promissory note or other evidence of same, to demand and receive from such vendor or his agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a sworn statement in writing substantially as hereinafter provided of the names and addresses of all the creditors of said vendor to whom said vendor may be indebted, together with the amount of the indebtedness due or owing or to become due or owing, by said vendor, to each of said creditors, and it shall be the duty of said vendor or his agent to furnish such statement which shall be verified by oath to substantially the following effect: * * * *

“64-702. *Liability of vendee.* Whenever any person shall bargain for the purchase in bulk of any portion of a stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, furniture, fixtures, equipment or supplies of a hotel or restaurant, barber shop or other place of business wherein the furniture, fixtures, and equipment are used in carrying on said business, otherwise than in the regular course of trade, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof, or his agent, or to any person for his use, any promissory note or other evidence of indebtedness, or give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase-price or any part thereof, without at least five days previously thereto having demanded of and received from said vendor or from his agent the statement provided for in section 64-701 and verified as therein provided, and without notifying also at least five days previously thereto, person-

ally or by registered mail, every creditor as shown upon said verified statement of said proposed sale or transfer, with the price thereof, the person to whom said sale or transfer is made, and the time and conditions of payment, and without paying or seeing to it that the purchase-money of the said property is applied to the payment of the bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, unless otherwise provided for by the statutes designating priority of payments, such sale or transfer shall be fraudulent and void, and said vendee shall be personally liable to any creditor or to all creditors of said vendor for their proportionate share of the purchase-price of said business, whether the same has been paid by vendee to vendor or not.

"64-705. *Application of law.* Sellers, or vendors and purchasers under this chapter, shall include corporations, associations, copartnerships and individuals, but nothing contained in this chapter shall apply to sales or transfers by executors, administrators, receivers, or assignees, under a voluntary assignment for the benefit of creditors, trustees in bankruptcy or any public officer under judicial process."

The consolidated statement of Chase's financial condition at the time he made his transfer, which was introduced in evidence, showing assets of a million dollars, shows conclusively that only approximately Eighty Thousand Dollars (\$80,000) of this was for lands and buildings; that the stock of used automobiles, trailers, parts, accessories and tires amounted to approximately Seven Hundred Thousand Dollars (\$700,000) and were all of the substantial assets that he held.

The appellant seeks to avoid the affect of the Bulk Sales Act by arguing that it does not apply to real estate. However, the mere fact that an individual engaged in the buying and selling of used automobiles, replacement parts and accessories owned some real estate did not exempt him from compliance with the Bulk Sales Act.

“A transfer of the entire assets, consisting of personal property, of a commercial partnership engaged in the business of buying and selling automobiles, replacement parts, and accessories, to a new corporation formed by individual members of the former partnership, is within a provision of a Bulk Sales Law declaring that sales in bulk and otherwise that in the ordinary course of trade and in the regular and usual prosecution of the business of the transferrer, of any portion or the whole of a stock of merchandise shall be void as against creditors of the transferrer, unless made in conformity with the provisions of the act.” *Brinson vs. Monroe Auto. & Supply Co., et al.* (La.) 158 So. 558.

In the case of *West Shore Furniture Co. vs. Murphy*, 141 N. Y. S. 835, it was held that where the insolvent continuing partner of a mercantile firm transferred his whole stock in trade to a newly created corporation in consideration for the whole capital stock that the transaction was governed by the Bulk Sales Law of New York and was clearly fraudulent as to creditors.

In *Kline vs. Sims* (Miss.) 114 So. 871, where it was alleged that the owner of an insolvent mercantile business formed a corporation to take over the business without complying

with the Mississippi Bulk Sales Law, that the sale was void and fraudulent to the creditor of the original business to whom notice of the sale was not given in accordance with the Bulk Sales Act. See also, *First National Bank vs. Davis*, 147 Mo. 93 and *Smith-Calhoun Rubber Co. vs. McGhee Rubber Co.*, 235 S. W. 321.

It was held in *Sakelos vs. Hutchinson Bros.* 99 Atl. 357, that under the Bulk Sales Act, a transfer, by a partnership operating a restaurant, of its assets to a corporation formed by its members is void as to a creditor, there having been no compliance with the requirements of the Bulk Sales Act.

In the case of *First National Bank vs. Raleigh Savings Bank and Trust*, 4th Circuit, 37 Fed. (2d) 301, that a transfer of a large part of the merchandise to a separate corporation organized for that purpose, which assumed none of the debts, and merely issued its capital stock in payment, constituted a sale which was void as to creditors because of non-compliance with the North Carolina Bulk Sales Law.

The cases holding that where an individual transfers his assets to a corporation in return for its stock is not within the Bulk Sales Act, are reasoned and based solely upon the proposition that there has been a bona fide sale and that it is merely a shifting of the assets and that it is no more than the individual doing business under a fictitious or assumed name but there is no law to the effect that either an individual or a corporation making a bona fide sale of all of his or its assets to another for an independent and valuable consideration is not required to comply with the Bulk Sales Act. *Goodman vs. Clarkson*, 147 S. E. 183, *Stockyards Pet. Co. vs. Bedell*

(Kans.) 278 Pac. 739; *B. F. Goodrich Rubber Co. vs. Breland*, 154 So. 303; *Mott vs. Reeves*, 211 N. Y. S. 375, affirmed 215 N. Y. S. 889, affirmed 159 N. E. 654; *Raleigh Tire and Rubber Company vs. Morris*, (N. C.) 106 S. E. 562.

We believe the only cases that can be found holding that in a transaction where all of an individual's assets, when transferred to a corporation in exchange for corporate stock is not a fraud upon creditors, are those cases that reason that the individual still has in his possession the corporate stock and that it is sufficient to satisfy his obligation upon attachment. These cases are not in point here and are against the weight of authority. The appellee proceeded diligently in Case No. 1539 and there is no showing and can be no showing made that when she filed her suit in the District Court and when she recovered her judgment in Case No. 1539, that a levy upon the corporate stock owned by Jesse M. Chase would have been of any benefit, in fact it would have been absolutely futile. He was insolvent then according to his own testimony and the corporation was insolvent at that time and he advised her even before she filed her suit (Exhibit "13") that if she filed it, the corporation would go into a receivership.

VI.

ANALYSIS OF THE ARGUMENT IN APPELLANT'S BRIEF.

The appellant among other things argues, as he states it on page 21 of his brief, redemption by successor in interest

likes redeemed property from the lien and in support thereof, cited *Evans vs. City of American Falls* 52 Idaho 7, 11 Pac. (2d) 363. The case cited shows without any further explanation that it is not a point and further that it is directly in the appellee's favor. The California Code referred to the case of *Jimpson vs. Castle*, 52 Cal. 644, wherein the Court in construing the statute identical with Idaho's, held in part.

"In case of a redemption by the judgment debtor or the mortgagor, the affect of the sale is extinguished, and the statute declares he is restored to his estate in the land, which then, for the first time, become subject to the lien of the unsatisfied portion of the judgment."

The redemption, if any redemption was made, and the appellant in one breath claims there was not a redemption and in the next claims there was, was only a redemption by the receiver from a valid judgment against him.

However, this certainly can not be very important in view of the attempted explanation made by the receiver under the questioning of the trial Court at the time of the hearing. (Pages 93-94).

The appellant argues that the appellee's answer and affirmative defense do not state facts sufficient to constitute a defense or to state a cause under the counter-claim. However, he cites no authorities whatever in support of this argument and having made no objection of this nature before or during the trial, such an argument is of no force in view of the Federal Rules of Civil Procedure with reference to pleading.

It is shown that the receiver had paid all judgments

against Jesse M. Chase, Inc.; Jesse M. Chase, himself, testified that this particular judgment was one against the corporation and should be paid by it, the appellee was entitled to a judgment of the trial Court, that the receiver be directed to treat her judgment the same as all others and having subjected himself to the jurisdiction of the Court he is bound by the judgment.

It is also argued in the appellant's brief that the transfer from Chase to the corporation was a bona fide transaction; that Chase was in fine financial condition and not involved.

To say the least, there is certainly evidence in the record to support the trial Judge's findings after seeing and hearing the witnesses and being familiar with all of the facts developed in the different suits, he found against the appellant's contention.

Jesse M. Chase could certainly be and was heavily involved without necessarily being insolvent. Regardless of what his financial statement may have shown at the time he transferred all of his property to the corporation, he was involved by reason of a large contingent liability as is shown by the different exhibits and he wanted to escape any personal liability. He also showed by his testimony in the State Court and in the instant case that after he had transferred all of his assets, he did not have any property or anything to pay with. The argument that he had his stock in his own corporation and that the appellee was negligent because she did not sue that corporation in the first place, begs the whole question. How could the appellee know the extent to which Chase was

evolved or that he would transfer all of his property until these facts were developed in the litigation? Chase threatened the appellee with the receivership when she made demand upon him for the payment of her investor's certificates and he was still corresponding with her on Jesse M. Chase stationery and writing both as an individual and president of his corporation. See Exhibit "13" written under date of November 30, 1949, wherein he stated to her:

"If you do insist upon your money, then I will go ahead and sell out and do it in an orderly way and everybody will be paid, but if you file suit and it causes the appointment of a receiver, then I will be in a position that I can't tell you what will be the result."

This was over two years after the formation of the Jesse M. Chase, Inc., and Mr. Chase was still speaking in the first person as the sole owner and operator of Jesse M. Chase, Inc.

"The mere fact that a person is solvent as and when he transfers his property does not necessarily render him incapable of making conveyances fraudulent to his creditors. While solvency when transfer is made affords evidence against a claimed fraudulent purpose, it is only an item of evidence to be considered with all the other facts".

August Lind, Receiver vs. Johnson Co. (Minn.)
282 N. W. 661, 119 A. L. R. 940.

It is argued by appellant that the annotation in 85 A. L. R. at Page 140 is authority for the position that Chase's transfer to his own corporation under the circumstances did not amount to a fraud upon creditors. We submit that the quoted portion of the editor's comment appearing on page 17 of

appellant's brief does not fit the circumstances in the instant case and justify the trial Court in making the decision he did.

Attention is called to the appellant's Specification of Error No. 6. This specification has to do with the Court's Finding of Fact No. XII. The specification which is found on page 15 of appellant's brief is:

"The trial court erred in making Finding of Fact No. XII (P. 27) for the reason that the same is a conclusion of law, contrary to both the evidence and the law."

This finding, which is set forth in our Statement of Facts, certainly is not a conclusion of law and it is based upon the evidence and supported thereby. The appellant's treatment thereof at the bottom of page 30 and the top of page 31 of his brief, indicates that he has misinterpreted the finding or that he is discussing something else. The finding is not a finding to the effect that the appellee sold the real estate involved; it is a finding to the effect that the plaintiff in the District Court, the appellant here, sold the real estate and the finding, of course, has reference to the sale of the real estate to the C. C. Anderson Company. It appears from the record that this is the fact.

Appellant, on page 23 of the brief, takes the position that anything that happened to the title to the property involved, after the commencement of the action, can not have any bearing on the instant case and reasons from this that a transfer of the title, pending the suit, has no effect whatever upon the rights of the defendant. This argument can not

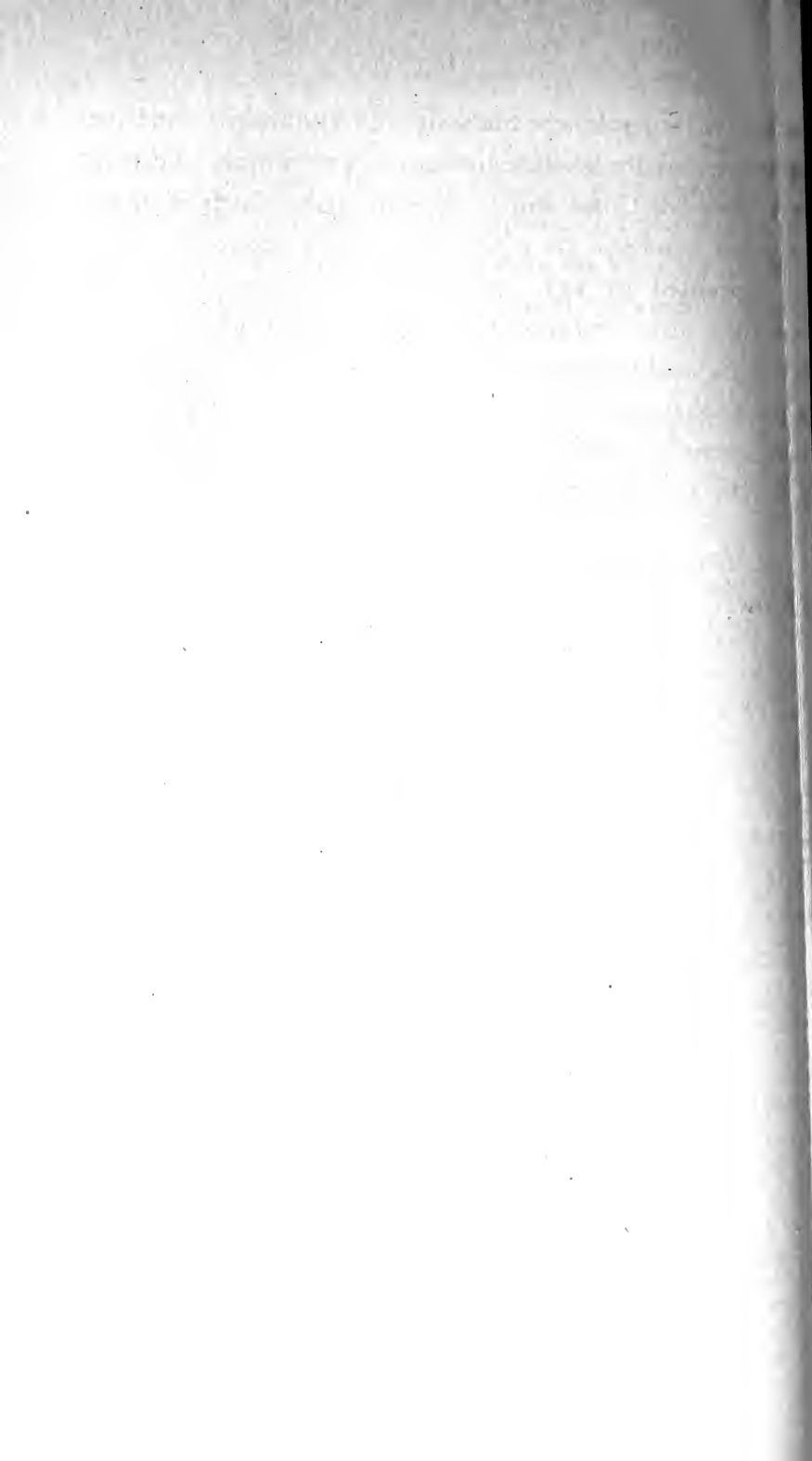
and as is shown by the authorities heretofore cited and the argument that the receiver having accepted a quitclaim deed from Jesse M. Chase and an assignment in his right of redemption, stands in the position of a bona fide redeemptor is not supported by any citation of authorities and merely shows the utter confusion that the receiver is in as to what theory he could follow in order to make a sale of the real estate and at the same time still preserving his rights to claim as the owner thereof and to prevent the appellee from satisfying a valid judgment.

It is respectfully submitted that the judgment should be affirmed.

B. W. DAVIS

Attorney for Appellee.

Pocatello, Idaho



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Reply Brief of Appellee^{ANT}

Appeal from the United States District Court for the District
of Idaho, Eastern Division.

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FILED

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PAUL A. O'BRIEN,

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Reply Brief of Appellant^{ANT}

STATEMENT

Appellee's brief brings into question the transfer of the real estate, the subject matter of this action, by appellant to C. C. Anderson Company of Caldwell, a corporation, pendente lite, as a defense. We deem it advisable to reply thereto.

First, we desire to make a correction. Appellant's specification of error No. 6 assigns as error that the trial court erred in making its Finding of Fact XII, on the ground that same

was a conclusion of law contrary to both the evidence and the law. Said Finding No. XII, page 27, reads as follows:

“That the plaintiff herein subsequent to the rendition of the judgment in favor of Louise B. Musselman Sisil and against Jesse M. Chase in Case 1539 as aforesaid and subsequent to the filing and recording of an abstract of said judgment in the office of the County Recorder of Bannock County, Idaho, sold the real estate described in plaintiff's amended complaint.”

We find we misread the finding, apparently construing the word “plaintiff” as meaning the plaintiff in said case No. 1539, Sisil v. Chase, instead of the appellant, who is plaintiff in this action. We wish to apologize to both Court and Counsel for this error. We concede that the finding is correct, and our specification of error regarding said finding is not well taken on the grounds specified. However, we take the position that the court erred in making said finding on the ground that it is immaterial, and we desire the courts indulgence to restate said specification, so that it will read as follows:

“VI.

“The trial court erred in making Finding of Fact XII (p. 27) for the reason that the same is immaterial.”

There are other matters in appellee's brief that we desire to reply to, but it consists largely of argument in distinguishing the cases cited in support of her position, from the law as

hid down in the authorities cited by appellant in his original brief, and for the sake of brevity, we will leave those matters to the consideration of the court, and to oral argument. This reply brief therefore will be addressed to the one point, which concerns the effect of transfer of interest, pendente lite.

SUMMARY OF ARGUMENT.

In the case of any transfer of interest, the action may be continued by or against the original party.

Rule 25 (c)—RULES OF PROCEDURE FOR FEDERAL DISTRICT COURTS.

McComb v. Row River Lumber Company. C. A. 9th, 1949, 177 F. 2d 129.

French v. Edwards, Fed. Case No. 5,097. 9 Fed. Cases page 778.

Elliot v. Teal, Fed. Case No. 4,389. 8 Fed. Cases page 537.

47 C. J. 160, and cases therein cited.

Western Land & Irrigation Co. v. Humfeld, 114 Ore. 53, 234 Pac. 797.

Statutes similar to Rule 25(c) were made to promote utility and convenience in the prosecution of remedies by doing away with the unnecessary expense and delay of commencing a second action for the same cause.

Elliot v. Teal, Supra.

The transferee of real property, pendente lite, is protected in his interest in the res, by Section 55-605 of the Idaho Code, and hence substitution is not necessary, said Section providing that any subsequently acquired title passes by operation of law to the grantee or his successors.

Idaho Code 55-605.

ARGUMENT.

It is our position that *Rule 25 (c) of the District Court Rules of Procedure* is conclusive.

Rule 25 (c) "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

The only case we find where this court has construed the above rule is *McComb v. Row River Lumber Co.*, 177 F 2d 129. And in that case this court said:

"The Rules of Civil Procedure 'govern the procedure in the district courts of the United States,' Rule 1. These rules are adopted by this court wherever applicable with respect to appeals in civil actions. But it will be noted that under Rule 25 (c) it is not mandatory that a substitution be made in every case of a transfer of interest."

"Where we have allowed a substitution, it has been in cases where the plaintiff below has transferred his interest in the subject matter of the action, which was to protect an interest in a res."

The general rule with regard to substitution of parties where a party makes an assignment pendente lite, is stated in 47 C. J., at page 160, as follows:

"Where a party to an action makes an assignment pendente lite, it is not usually essential for the transferee to be substituted; nor can the opposite party insist on such substitution, it being ordinarily permissible to continue the action in the name of the original plaintiff for the use of the transferee."

In Federal Case No. 5,097, *French v. Edwards*, 9 Fed. Cases 778, the Court held:

"Where in an action to recover land, the plaintiff conveys to a stranger the premises in controversy, pendente lite, under the Code of Procedure of the state of California, the action may be prosecuted to judgment in the name of the original party; and such conveyance cannot be set up by way of supplemental answer to defeat a recovery of possession."

The provision of the California Code at that time is set forth in the opinion and reads as follows:

"In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

This is identical to Idaho Code, Section 5-319.

In the case of Elliot v. Teal, Fed. Case No. 4389, 8 Fed. Cases 537, the court held:

"The rule of the common law that an action abated by the termination or transfer of the plaintiff's interest therein, pendente lite, is abrogated by section 37 of the Oregon Civil Code, which declares that no action shall abate for any such cause; and Section 27 of said Code which provides that 'every action shall be prosecuted in the name of the real party in interest, must, in connection with said section 37, be taken to mean that every action shall be commenced in the name of the real party in interest.'" Syl. 1.

The Idaho Code provisions with regard to abatement of proceedings on death or transfer of interest is fully set forth as follows:

"5-319. DEATH OR TRANSFER OF INTEREST — PROCEDURE — ACTIONS BY OR AGAINST PUBLIC OFFICERS.—An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceedings survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. An action or proceeding brought by or against any

public officer in his official capacity and which action or proceeding is pending at the time of his death, resignation, retirement or removal from office does not abate. The court on its own motion or on motion for substitution may substitute the successor in office and allow the action or proceeding to be continued against such successor."

In the case of *Western Land & Irrigation Co. v. Humfeld*, 114 Ore. 53, 234 Pac. 797, the Supreme Court of Oregon held that the statutes of the state do not require the substitution of a purchaser of real property involved in a litigation while that litigation is pending.

We have read the Idaho case cited by appellee, *Carrington v. Crandall*, 63 Idaho 651, 124 Pac. (2d) 914, and if this case were in the Idaho courts, we would consider it as binding. However, in this case appellee, through motion for removal of the cause to the United States District Court, chose this forum, and thereby placed it under the Rules of Procedure of the District Courts of the United States. We therefore deem further comment on the same unnecessary, except to state in passing, we have never seen a more masterful misinterpretation of plain words of the English Language.

We have examined the other cases cited by appellee in support of this point, and are unable to find any of them applicable.

In this case we find appellee in the anomolous position of urging that the Warranty Deed from Jesse M. Chase and wife to Jesse M. Chase, Inc., the corporation, (Plaint-

tiff's Exhibit No. 3) left remaining in said Chase, some interest which was subject to levy and sale under execution, and at the same time, urging the court that a deed of grant from the Receiver, appellant herein, to C. C. Anderson Company, has divested this court of all jurisdiction to continue with the case. Any interest which appellee could subsequently acquire would pass on directly to the grantee under the provisions of Section 55-605 of the Idaho Code reading as follows:

"55-605. Where a person purports by proper instrument to convey or grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors."

Under this code provision, we believe that substitution was entirely unnecessary, as any benefits the appellant acquires as a result of a judgment in his favor passes by operation of law to the C. C. Anderson Company or its successors.

Another thing we note, and that is, that appellee is perfectly willing to take advantage of the fact that appellant is in court, in that he has attempted to bring into the case other issues even to the extent of seeking a determination of lien rights upon personal property, and a declaratory judgment making the amount of the judgment in case 1539, a judgment against this appellant.

We presume that this was one of the reasons she did not raise the transfer of interest question at the close of appel-

ant's case during the trial. In other words, the appellee seems perfectly willing to get all the advantages of the appellant being in court, and now having obtained same by a favorable decision of the lower court, now seeks to urge upon this court, the absurd proposition that appellant had no right in court.

And in this connection we believe that the proper rule of law to apply, in case the court should hold that appellant's action abated by reason of the transfer of interest that, the entire case be dismissed without prejudice in order that the transferee, C. C. Anderson Company, can come into court, and obtain a trial of the issues, without being bound by any decision of the court on matters which might affect its claim of clear title adversely.

CONCLUSION.

The plain wording of Rule 25 (c) permits this case to be continued in the name of the original party, and that the same having been done, that the case should be heard and determined by this court upon its merits on the other issues as presented by the pleadings, the transcript, and briefs of counsel.

It is therefore respectfully submitted that this case should be reversed and the trial court directed to enter judgment as

prayed in plaintiff's complaint, and that appellee's counterclaim and prayer for affirmative relief be dismissed.

Respectfully submitted,

F. M. BISTLINE

R. DON BISTLINE,

Attorneys for Appellant.

10738

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Petition For Rehearing

F. M. BISTLINE

Pocatello, Idaho

R. DON BISTLINE

Pocatello, Idaho

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Pocatello, Idaho

Attorney for Appellee.

FILED

NOV 26 1951

PAUL P. O'BRIEN
CLERK

IN THE

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FOR THE NINTH CIRCUIT

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE,
INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Petition For Rehearing

To the Honorable United States Court of Appeals for
the Ninth Circuit:

Appellant respectfully petitions for a re-hearing upon
the grounds and reasons as hereinafter set forth:

As we read the written opinion filed October 27, 1951,
this court rests its conclusion that the trial court was correct
in finding that Jesse M. Chase at the time he transferred his
business properties to the Jesse M. Chase, Inc., corporation,
in exchange for stock in said corporation was acting with
intent to hinder, delay and defraud creditors, because there
was a violation of the Bulk Sales Law of the State of Idaho,
Section 64-701, et seq., Idaho, in that same constituted a
badge of fraud.

From a thorough reading of the opinion we find no
statement by the court as to what this violation consisted of.

In our original brief we called attention to the fact that a compliance is required in Idaho, only when the sale is "for cash or on credit." If it is the court's position that a transfer of stock in trade to a corporation organized to take over the business for its capital stock is a sale for "cash" or "on credit," we believe that it should clarify its stand. We see no need to repeat our citations and argument on this point, they are covered in appellant's original brief.

Since this appears to be the only badge of fraud found, we rest our petition for rehearing entirely on this point.

If on the other hand we have not read the opinion correctly and the court relies on other evidence to establish the "intent to hinder, delay or defraud creditors" at the time of the transfer from the individual to the corporation, we can do nothing other than ask for a re-examination of the record.

There are other matters in connection with the opinion that we deem it advisable to call to the court's attention:

The last sentence of the first paragraph of said opinion reads as follows:

"Chase and wife turned in by warranty deed, dated February 10, 1947, four lots in Pocatello, upon which was a garage."

We feel that a complete statement of this transaction would require a statement by the court that common stock in the corporation was issued to Chase and wife in consideration therefor for the value that the same was carried on the books as appeared from the balance sheet of December

31, 1946, on which the transfer was based.

We also call attention to the following statement on page 3 of the opinion:

"The findings of the Trial Court are supported by substantial evidence and, since no error appears there is no reason to disturb them."

We feel that it would be more proper if the court had set forth, at least in a general way, the evidence relied upon. Appellant's case on appeal is based entirely upon the point that there is no evidence in the record supporting these findings, and, such being the case, it would seem that a court should set forth the evidence supporting the findings.

Attention is also called to the following statement:

"The evidence shows Chase did not retain enough property to satisfy his debts."

This we feel contradicts the court's own statement in the first paragraph of its opinion. Also we submit that there is no evidence whatever in the record going to the question as to whether or not Chase had other assets after the transfer was made. If the evidence does so show, we feel that the court should make specific reference to it.

By way of further suggestion, we feel that, in view of the fact that appellee raised the question of the right of the appellant to proceed in his name with the quiet title suit after transfer of the property to the C. C. Anderson Company of Caldwell, Idaho, during the pendency of the suit, that, it would be advisable for the Court to make a specific statement with regard thereto for the future guidance of the bench and bar.

CONCLUSION.

Appellant, as Receiver, is interested only in getting the correct ruling in the case. The final outcome of the case in no way affects him personally. However, he sincerely feels that the opinion filed does not reflect a correct application of the law to the facts of this case as disclosed by the record, and therefore, respectfully urges that a re-hearing be granted.

Respectfully submitted,

F. M. Bistline
F. M. Bistline
R. Don Bistline
R. Don Bistline,

Attorneys for Appellant,

Residence and Post Office Address:
Pocatello, Idaho.

STATE OF IDAHO
COUNTY OF BANNOCK } ss.

I, F. M. Bistline, do hereby certify that I am one of the attorneys of record for the appellant in the above entitled cause; that the foregoing petition for re-hearing is well founded, and that it is not interposed for delay.

F. M. Bistline

' Of Counsel for Appellant.

No. 12,739

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CECIL ARMSTRONG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

MACKLIN FLEMING,

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Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

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The first of the year was a very
 cold one, and the weather was
 very disagreeable. The wind was
 very strong, and the rain was
 very heavy. The snow was
 very deep, and the ice was
 very thick. The water was
 very cold, and the fire was
 very hot. The food was
 very good, and the drink was
 very bad. The people were
 very kind, and the money was
 very little. The house was
 very small, and the room was
 very dark. The bed was
 very hard, and the pillow was
 very soft. The blanket was
 very thin, and the sheet was
 very thick. The curtain was
 very light, and the window was
 very dark. The door was
 very heavy, and the lock was
 very strong. The key was
 very small, and the handle was
 very large. The knob was
 very round, and the ring was
 very square. The chain was
 very long, and the bolt was
 very short. The screw was
 very tight, and the nut was
 very loose. The washer was
 very flat, and the spring was
 very coiled. The pin was
 very sharp, and the nail was
 very blunt. The screwdriver was
 very long, and the wrench was
 very short. The hammer was
 very heavy, and the saw was
 very light. The axe was
 very sharp, and the pickaxe was
 very blunt. The shovel was
 very long, and the spade was
 very short. The trowel was
 very small, and the hoe was
 very large. The rake was
 very long, and the brush was
 very short. The broom was
 very long, and the mop was
 very short. The sponge was
 very soft, and the cloth was
 very hard. The towel was
 very long, and the handkerchief
 was very small. The scarf was
 very long, and the necktie was
 very short. The shirt was
 very long, and the trousers
 were very short. The coat was
 very long, and the jacket was
 very short. The vest was
 very long, and the undershirt
 was very short. The socks were
 very long, and the shoes were
 very short. The gloves were
 very long, and the mittens were
 very short. The hat was
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No. 12,739

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CECIL ARMSTRONG,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant Cecil Armstrong pleaded guilty to an indictment charging four counts of mail theft. On April 7, 1949, he was sentenced to a term of five years on count one, and, consecutively, to a term of three years on counts two, three, and four, these latter sentences to run concurrently with each other.

On September 26, 1950, appellant applied to the trial court for a correction of sentence, which motion was denied. Leave to appeal in *forma pauperis* was granted.

The sole point raised by appellant is that the indictment under which he was sentenced did not specify the value of the letters he had stolen, and accordingly,

it is to be presumed that the value of the stolen letters was less than \$100, and hence under the provision of Title 18, United States Code, Section 1708, the maximum sentence permissible under the statute was one year on each count.

The sole issue then is the construction of Section 1708, Title 18, United States Code, adopted September 1, 1948:

“§1708. Theft or receipt of stolen mail matter generally

“Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

“Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

“Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein de-

scribed, knowing the same to have been stolen, taken, embezzled, or abstracted * * *

“Shall be fined not more than \$2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”

CONTENTION OF APPELLANT.

Appellant contends that in cases of mail theft the government must allege and prove that the value of the stolen mail exceeds \$100 in order to sustain a felony conviction and sentence.

CONTENTION OF APPELLEE.

The construction advanced by appellant is illogical, not in accord with the history of the offense, and results from a misreading of the statute.

ARGUMENT.

I.

TWO OFFENSES DESCRIBED IN SECTION 1708: (1) THEFT OF MAIL; (2) PILFERING FROM THE MAIL. MAIL THEFT IS ALWAYS A FELONY. PILFERING FROM THE MAIL MAY BE A MISDEMEANOR IF THE VALUE OF THE STOLEN PROPERTY IS LESS THAN \$100.

This is a point of first instance, and to our knowledge no appellate court has previously ruled on the matter.

Federal statutes for generations have made theft of mail a serious felony punishable by a long period of imprisonment. The government's preservation of the integrity of the mail has been a cornerstone in the development of our national system of communication. Under the *Act of March 3, 1825, 4 U. S. Stat. at Large* 109 (1850 ed.), mail theft carried a maximum sentence of imprisonment of ten years. And continuously since 1872 mail theft has been a felony punishable by imprisonment up to five years. *Act, June 8, 1872, 17 Stat. 318*. This law was subsequently codified as Title 18, former Section 317, United States Code. A maximum sentence of five years was applicable both to mail theft and to pilfering from the mail until 1948.

In 1948 the statute was modified in one particular. In the case of pilfering from the mail the maximum sentence of imprisonment is limited to one year if the value of the article or thing pilfered does not exceed \$100.

It is this provision that appellant relies on to show a change in the entire statute.

Research discloses no suggestion that the Congress intended to make mail theft a misdemeanor in all cases except where the government could prove the dollar value of the stolen mail. In the great majority of cases of mail theft it would be impossible for the government to allege or prove the value of a particular letter or other item stolen. Hence, the interpretation sought by appellant would in the great majority of cases result in reducing mail theft from a felony to a misdemeanor. If the Congress had any such intention or disposition it does not appear in the new Criminal Code. For example, Section 1702, theft of mail with intent to obstruct the correspondence or pry into the secrets of another, carries a maximum penalty of five years. This offense is in all respects comparable to the offense in Section 1708 except that the motivation of the crime in Section 1702 is personal rather than larcenous.

It is only in the case of mail pilferage, or in the language of the statute, abstracting or removing from any mail any article or thing contained therein, that the question of value becomes pertinent. It appears clear that the intent of Congress was to reduce the crime of mail pilferage to a misdemeanor in cases where the value of the article or thing pilfered did not exceed \$100, i.e., make it comparable to the common law crime of petit larceny.

A logical result follows from this interpretation. The most serious act is the interference with the

government's possession of mail matter. The offense to the government is the same and the conduct of the postal service is interfered with as much when the mail matter involved is of little value as when the value is large.

II.

THE WORDING OF THE STATUTE INDICATES THAT THE MAXIMUM PENALTY OF ONE YEAR APPLIES ONLY TO THEFT FROM THE MAIL, I.E., PILFERAGE.

A reading the language of Section 1708 discloses that the application of the lesser punishment is limited to theft *from* the mail (i.e., abstracting or removing from any mail any article or thing contained therein). The phrase "article or thing" refers not to mail, letters, and the like, but to articles "*contained therein.*" We reprint Section 1708 with italicized portions to make this clear:

"§1708. Theft or receipt of stolen mail matter generally

"*Whoever* steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or *abstracts or removes from any* such letter, package, bag or *mail, any article or thing contained therein,* or secretes, embezzles, or destroys any

such letter, postal card, package, bag, or mail, *or any article or thing contained therein*; or

“Whoever steals, takes, or *abstracts*, or by fraud or deception obtains any letter, postal card, package, bag, or mail, *or any article or thing contained therein* which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

“Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, *or any article or thing contained therein*, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted * * *

“Shall be fined not more than \$2,000 or imprisoned not more than five years, or both; but if the value or face value of *any such article or thing* does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”

III.

THE FACTS IN THIS CASE ILLUSTRATE THE JUSTICE OF A FELONY CONVICTION.

In the instant case Armstrong was charged with stealing a letter from an authorized depository for mail matter. No other allegation was necessary in order to sustain the imposition of the sentence imposed. Recent reported cases on the subject of mail theft, the statements of the courts and the sentences

imposed in these cases, are not at variance with this view.

United States v. Kirby, 176 Fed. (2d) 101
(Second Circuit, 1949);

Green v. United States, 176 Fed. (2d) 541
(First Circuit, 1949);

United States v. Chinn, 85 Fed. Supp. 558
(Watkins, J., 1949);

Burton v. United States, 169 Fed. (2d) 969
(D. C. Circuit, 1948).

The facts of this particular case furnish good evidence why every theft of mail has always been classified as a felony. According to the papers filed by appellant in this appeal, the letters which he stole, the subject of counts two, three, and four, contained bank statements and cancelled checks of various individuals. The theft of such documents is, of course, a necessary preliminary to the forging of checks drawn on the bank accounts of such individuals, as well as an exact accounting of the maximum amount for which such checks may be passed. Such theft is patently a serious criminal offense, yet under the interpretation sought by appellant, the bank statements and cancelled checks having no actual value, all such crimes would hereafter become misdemeanors.

CONCLUSION.

The theft of the mail itself is the felony, regardless of the value of the letters stolen. Accordingly, the judgment of the trial court denying the motion for modification of sentence must be affirmed.

Dated, San Francisco, California,
January 31, 1951.

Respectfully submitted,

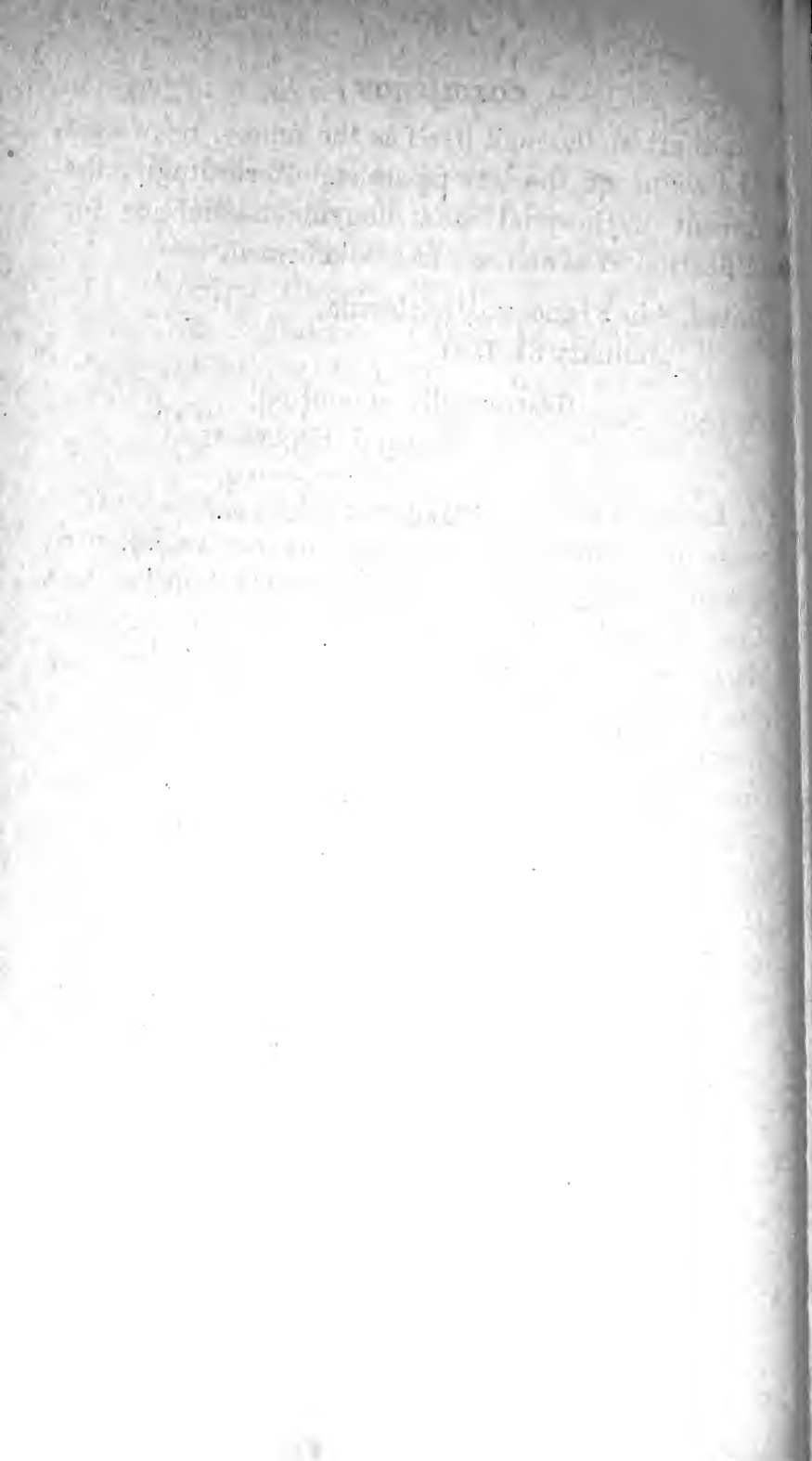
FRANK J. HENNESSY,

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Attorneys for Appellee.



No. 12,746

IN THE
United States Court of Appeals
For the Ninth Circuit

THEODORE W. COBB,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

FRANK J. HENNESSY,

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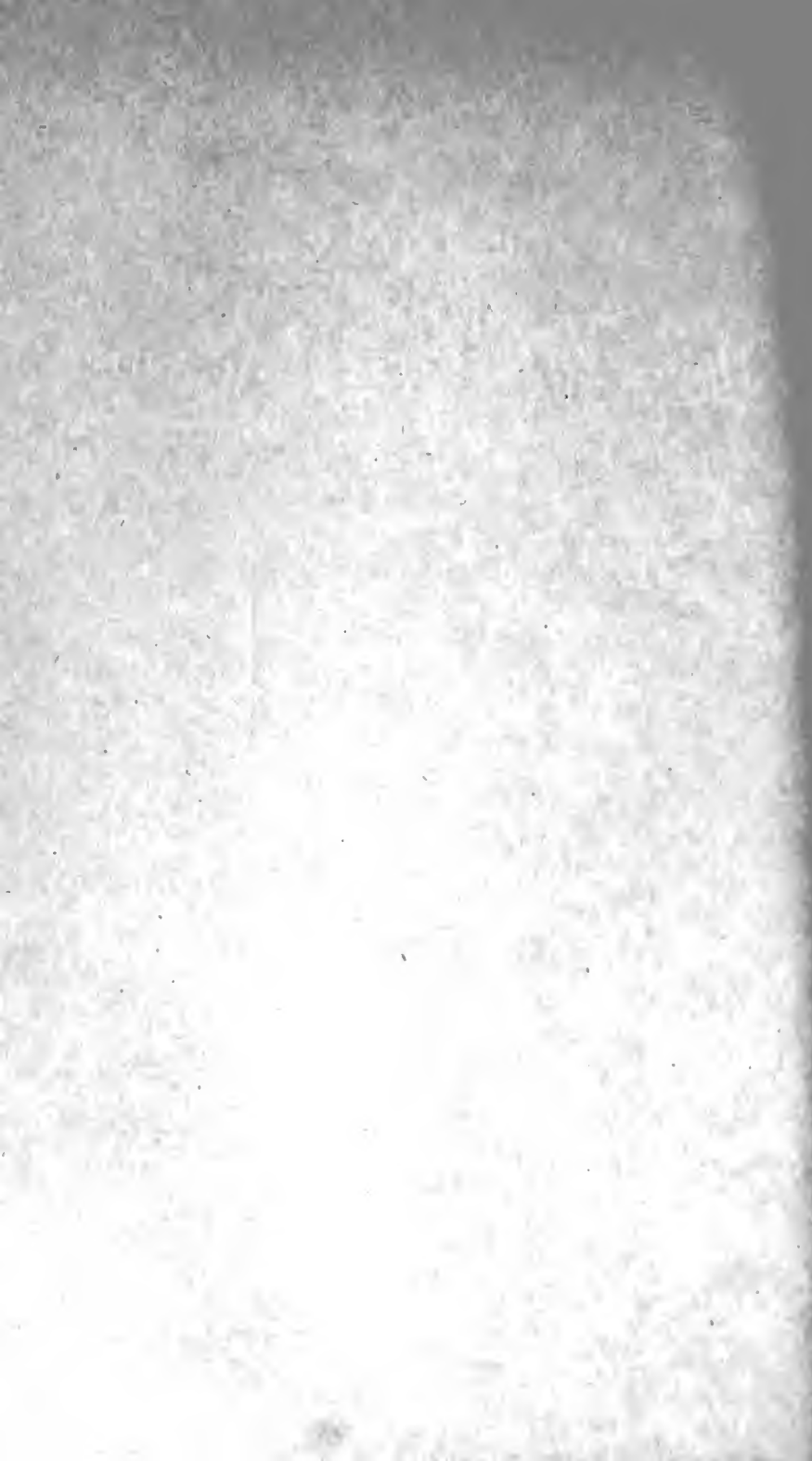
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PAUL P. O'BRIEN,
CLERK



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No. 12,746

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THEODORE W. COBB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

Briefly, for the purpose of this appeal, the facts may be stated as follows:

Appellant was injured on the Island of Okinawa, which is one of the Japanese mandated islands in the South Pacific known as the Ryukyu Archipelago, when the vehicle in which he was riding as a guest, collided with a crane left on a road by persons unknown but which had a mark on it of "U.S.M.G., or U. S. Military Government". Appellant was invited to ride in the vehicle to a village which was off limits. The vehicle in which he was riding was owned by the United States Government.

Okinawa had been secured and occupied by American troops during World War II and was still under occupation although, we believe, under the International Trustee System of the United Nations by an agreement concluded between the United States and the Security Council of the United Nations on July 18, 1947. Under this agreement the United States acted as an administering authority only. The disposition of this island has not yet been decided.

The trial Court held that Okinawa is a foreign country within the purview of the Federal Tort Claims Act and terminated the action in favor of the Government.

APPELLANT'S POINTS ON APPEAL.

The principal point, and perhaps the only point raised by the appeal, is the question of whether or not Okinawa was a foreign country within the purview of the Federal Tort Claims Act, which excluded from its operation "any claims arising in a foreign country".

The second point, which may be *obiter dictum*, is that assuming the crane was left negligently on the road, is there sufficient proof, under the Federal Tort Claims Act, to hold the United States liable, where the only evidence is that the crane was marked "U.S.M.G., or U. S. Military Government"? Thirdly, if so, is the case within the so-called "California Guest Law"?

WAS OKINAWA A FOREIGN COUNTRY?

The learned opinion of the trial Court seems to answer this question fully and it apparently was not answered by the appellant except incidentally, as hereinafter pointed out. We do not desire to repeat the opinion of the trial Court and hence will confine our brief to matters which do not appear therein.

(1) This precise question has been decided in other cases, which are cited in the opinion of the trial Court. These cases are apparently nearer in point to the question involved, than the following cases:

Dunn v. United States, D.C. N.D. Cal., Fed. Supp.;

Fleming v. Hager, 50 U.S. 603,

and

De Lima v. Bidwell, 182 U.S. 182.

All the cases cited by the Court and by us, except the last two, arose in Japan, Okinawa, Saipan and Belgium, and were claims under the Federal Tort Claims Act.

(2) The burden of proof is upon the appellant to prove (a) that Okinawa is not a foreign country, (b) the law of the place where the accident occurred.

(3) It is a matter of common knowledge that it is a foreign country, of which the Court may take judicial notice. (See British Encyclopedia and American Encyclopedia.)

(4) The Secretary of State of the United States has administratively determined it is not a part or

possession of the United States. (See Exhibit C.) This exhibit in part, states as follows:

“Okinawa is an island * * * over which Japan has been acknowledged internationally to be the sovereign * * *. No formal disposition of Okinawa has been reached concerning the final disposition of Okinawa * * *. It is the view of the Department of State that it is not a territory or possession of the United States.”

(5) Okinawa has not yet been placed, formally, under the International Trusteeship System of the United Nations but the United States acts only as administrator and administering authority for the trustee territory. (See Exhibit C.)

(6) The letter of General Allen (Appellant's Exhibit 5), states:

“The Island of Okinawa * * * is occupied enemy territory and under military government. * * * No treaty concerning any future status has yet been signed.”

Hence, from the appellant's own testimony, it is not United States territory nor governed by any laws of the United States.

(7) Only Congress can add territory to the United States, but Congress has not added Okinawa.

(8) The law applicable to Tort Claims is the *lex loci delicti*. Inasmuch as the appellant lays particular stress upon the point that the law of California governs this action, we will answer this more fully under the heading of “Law Applicable”.

(9) Appellant bases the jurisdiction of the Court on the evidence that Okinawa was militarily occupied. This obviously does not make it a part of the United States, otherwise the west part of Germany, Italy, Belgium, Japan and the Philippines, among others, would also be a part, or political subdivision, of the United States or its territories. A similar case on this point is

Straneri v. United States, 77 Fed. Supp. 241, cited in the Court's opinion. This was a suit brought under this Act due to alleged negligence of the United States in Belgium. Straneri claimed the Court had jurisdiction because of our military occupation. The Court held it had no jurisdiction even if Belgium was militarily occupied. The same holding was made in

Burnell v. United States, 77 Fed. Supp. 68, and

Dunn v. United States, heretofore cited.

(10) Appellant cites no authority or law which deprives the Japanese of Okinawa and adds it to the United States. He claims it is not foreign territory because of *General MacArthur's order* taking military control and that the island is militarily occupied. He admits that the provost marshal of the armed forces makes the regulations for the operation of the civilian population of the island. The military government consists merely of officers of the armed forces who take over the temporary government of the territory which has been seized by the armed forces, for the purpose of relieving the Army of controlling the civilian population. They are only agents of the mili-

tary forces. The provost marshal is merely concerned with enforcing among the troops the regulations laid down by the commanding general for his troops. We may add that in addition appellant states there are military planes and a military air base on the island. We also have military planes and a military air base in England, however we believe that England would object to this Court finding that England is a part of the United States.

(11) The Court in

Celine Smith, et al. v. United States, No. 28865, succinctly stated the law in its opinion as follows:

“Saipan, one of the former Japanese mandated islands in the South Pacific Ocean, has been placed under the International Trusteeship of the United Nations. The Trusteeship became effective under an agreement dated July 18, 1947, between the United States and the Security Council of the United Nations. By its terms, the United States acts as administering authority of the Trustee territory.

The conclusion is unescapable that Saipan is, and was, at the time the injury alleged occurred, a ‘foreign country’ within the meaning of 28 U.S.C. 943k. Obviously Saipan is not and never has been a component part or political subdivision of the United States or one of its possessions * * *’.

Saipan is in the same position as Okinawa as far as this case is concerned.

LAW APPLICABLE.

Apparently the only part of the trial Court's opinion which the appellant takes exception to, in its brief, is where the Court stated that such law as existed in Okinawa, is Japanese enacted law, and no Japanese law was pleaded or proven. Appellant answers this statement by saying the accident had occurred in an area which was *legally void* and that it was under the sovereignty of the United States. (Appellant's Brief, p. 19.) Appellant's answer begs the question. He proves it by a statement which he has to prove. Assuming, for the purpose of argument, there is no law, then he has no cause of action, for the Tort Claims Act is governed by "the law of the place where the act or omission occurred". There is no evidence that Okinawa is under the sovereignty of the United States. In fact the evidence is just the contrary. It was under the temporary control of the United States Army. (We think it has now been placed under the control of the United States Navy.) Congress, as the legislative body of the United States, has not enacted any laws for Okinawa. The Commanding General of the Army, or the Commanding Officer of the Navy, merely makes such regulations as he desires for the safety or control of the Army or Navy and which may be applicable to the civilian population of Okinawa insofar as the Army or Navy is concerned. There is no evidence that the Japanese laws were abrogated, nor is there anything in the record to disclose this. It would seem to be a presumption that, until the contrary appears, that the Japanese law was

still governing. We agree with the appellant, that if the Japanese law has been abrogated, then Okinawa has no law.

Saipan is similarly situated as far as this case is concerned, as Okinawa, yet Congress showed it never intended this Act to apply to these islands when it recently passed Private Law No. 396, 81st Congress, 2nd Session, approved March 16, 1950, compensating a Mr. Finley for personal injuries caused by the negligent operation of a Government vehicle on Saipan. Obviously Congress would not have done so if the claim was within the purview of this Act. On the contrary, both the House and Senate Committees in reporting on this Private Law, held that private relief was necessary.

In the footnote of the case of

U. S. v. Spelar, 338 U.S. 217,

the Court states:

“Local laws must be pleaded since the Federal Tort Claims Act permits suits only ‘where the United States, if a private person, would be liable * * * in accord with the law of the place where the act or omission occurred’.”

The Supreme Court in that case further said:

“* * * Congress was unwilling to subject the United States to liabilities depending upon the law of a foreign power * * *.”

On May 17, 1950, the United States Department of Defense announced a plan had been drawn by which Ryukyu Islands, held by the United States under

the Provisional Trusteeship of the United States was to be returned to Japanese sovereignty. The Court perhaps can take judicial notice of this and also perhaps that this plan has been changed.

It is the view of the trial Court that this phase of the case is not the controlling point, as the trial Court pointed out in its decision, although it stated that it was inclined to the view that the Japanese law covered the law of the place. However it is a factor of the Federal Tort Claims Act and an additional reason why Okinawa is a foreign territory.

Appellant relies on his statement, that in the absence of proof, the law is presumed to be that of California. We can not reconcile this statement with the *Spelar* case, nor does it seem reasonable that the burden would be upon the defendant to plead and prove the law where the accident occurred. It seems to us the plaintiff must prove his own cause of action, and in showing a violation of a law, he should plead and prove the law.

Appellant queries as to whether we can indulge in a commitment that we will terminate military government or occupation in Okinawa. Our answer is, can we indulge in any guessing, or if we can, can we not speculate contrary-wise? Appellant further states that the mission of our armed forces is to carry out the responsibilities of the United States. He does not state or prove what these are. However we do not think it is to supersede Congress in making laws

10

or annexing territory. The armed forces we think are merely a branch of the Government which enforces the mandates of Congress or the President.

Appellant states that the United States' rights to Okinawa had not been clearly defined. (Page 7.) Should this Court supersede Congress in so doing? He refers to the *Cross v. Harrison* case, where custom duties were enacted before a treaty of peace with Mexico was made. We think it is not in point and has nothing to do with laws and annexing territory, but merely with regulations. We think that the Army occupying a territory may make such regulations as are necessary for the safety or well-being of its command, even as to regulating prices, as long, among other things, as it does not conflict with the laws of the United States. It is also only a temporary matter.

Appellant also cites *Halleck International Law*, that a state may acquire a domain by conquest but it must be confirmed by treaty or tacit consent. Certainly there is no treaty as yet and there may be a tacit consent by Russia for the Army to occupy Okinawa pending the final determination, but we think it is far-fetched to say that Stalin has agreed that Okinawa or Japan will be a part of the United States.

IS THERE SUFFICIENT PROOF UNDER THE FEDERAL TORT CLAIMS ACT TO HOLD THE UNITED STATES LIABLE?

This part of the points raised on appeal, as likewise the third point, may be considered by this Court

obiter dicta. However as the points have been raised, we will answer briefly.

The Federal Tort Claims Act states, under the heading "Jurisdiction",

"Subject to the provisions of this title * * * the United States District Court * * * shall have exclusive jurisdiction * * * render judgment * * * on account of personal injury * * * caused by the neglect or wrongful act * * * of any employee of the Government *while acting in the scope of his office or employment* (italics ours) under circumstances where the United States, if a private person, would be liable to the claimant * * * in accordance with the law of the place where the act or omission occurred."

It will be noted that the law specifically makes the United States liable and gives the Court *jurisdiction* only while "acting in the scope of his employment". Therein it differs with the California law. In this case there is no common law involved. It is purely statutory. The plaintiff can sue only through the permission of the sovereign and only upon the exact terms it permits. The Act makes it mandatory on the appellant to *prove* someone was at the time of the impact acting within the scope of his employment. If appellant does not do so, the District Court has *no jurisdiction* to try the case. It is a jurisdiction requisite, a condition *sine qua non*. No presumption can be indulged in because (a) the sovereign requires proof, (b) "a presumption is a deduction which the law *expressly* directs to be made * * *". (See 1959

C.C.P. of Calif.) Presumptions are wholly creatures of law.

Davis v. Hearst, 160 C. 143, 116 P. 530.

Here the law expressly states and directs that the Court only has jurisdiction if the employee was in the scope of his employment and then applies the law of the place of the accident. Congress could have simply left out the scope of employment in the Act, if that was its intention.

The Legislature may provide certain things shall be presumptive or *prima facie* evidence.

People v. Fitzgerald, 14 C.A. (2d) 180, 58 P. (2d) 718.

But Congress did not so provide. On the contrary it made it mandatory that it be proven before the Court has jurisdiction. There are no presumptions even in the State of California, except those enumerated in the Code of Civil Procedure of California.

Setrakian v. I.A.C., 61 C.A. 582, 215 Pac. 504.

Nor can a presumption be based upon a presumption. A similar case of this on the facts and law is the case of

Victor Hubsch v. U. S., 174 F. (2d) 7.

We cannot distinguish that case from the present on the law involved. This case is so important that we do not desire to quote part thereof.

Another case is

U. S. v. Evelyn Campbell, 172 F. (2d) 500.

The facts in this case are not as clearly in point as in the *Hubsch* case but the basis for the decision is the

same. In this case a United States sailor, while running for a troop train, struck and injured a lady. The plaintiff contended the sailor was acting "in line of duty", which in the Tort Claims Act is the same as course and scope of employment. The Circuit Court in holding this was not so, stated,

"The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states. The very heart and substance of the act is to be found in the words, 'scope of his office or employment', not as appellee would read them when wrenched out of their context, but as they are precisely limited in it."

Therefore it seems clear that the appellant must prove that the crane was left there by an employee of the United States. This he has apparently failed to do. The mere fact that there was "U.S.M.G. or U. S. Military Government" painted on the vehicle, as testified by appellant's witness, does not make it an act of negligence within the course and scope of the authority. Perhaps the vehicle may have been stolen, borrowed, rented, or one of many other reasons beyond the scope of the employment of a Government employee. It may have been rented by the contractor doing the work on Okinawa. We do not

know, and apparently neither does the appellant, yet the burden is on the appellant to prove this.

Another exemption under this Act is that of an employee acting within his discretion, and it may have come under this exemption.

In

King v. United States, 178 F. (2d) 320, a United States aeroplane was taken by one of the Army personnel without the consent of the member's superior officer. It crashed into the plaintiff's home but recovery was denied on the ground that it was not within the course and scope of the employment of said member of the Army personnel.

In

U. S. v. Eleazer, 177 F. (2d) 914, an officer was driving home on leave and collided with plaintiff's automobile. It was held he was acting for his own purpose.

As Judge Bone of this Circuit said:

“The sovereign surrenders its immunity to suit *only* where the act in question is performed within the scope of employment.”

CALIFORNIA GUEST LAW.

We do not think that the law of this case is the law of California, but if so, would not the appellant come within the so-called California Guest Law? That is, he was riding in an automobile of the United States as a guest without paying any consideration therefor,

and while so riding, was injured. In such a case, he can not recover unless he shows intoxication or willful misconduct of said driver. (Vehicle Code 1935, Sec. 403.) A general discussion on this law is stated in 2 *Cal. Jur. Prud. Supp.* page 567.

Dated, San Francisco, California,
February 7, 1951.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellee.

The first of these is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference. This is
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No. 12747

United States
Court of Appeals
For the Ninth Circuit.

J. R. NORBERG, an Individual Doing Business as NORBERG
ADJUSTMENT BUREAU; HOPE D. PETTEY, WIL-
LIAM B. DOLPH, ALICE HUSTON LEWIS, HELEN
S. MARK, ELIZABETH N. BINGHAM, D. NORTH
CLARK, EDWIN P. FRANKLIN, GLENNA G. DOLPH,
Individually and Doing Business as Co-partners Under the
Firm Name and Style of KJBS BROADCASTERS,

Appellants,

vs.

PAUL W. RYAN, Trustee of the Estate of BRICK O'GOLD, a
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.



No. 12747

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Appellants,

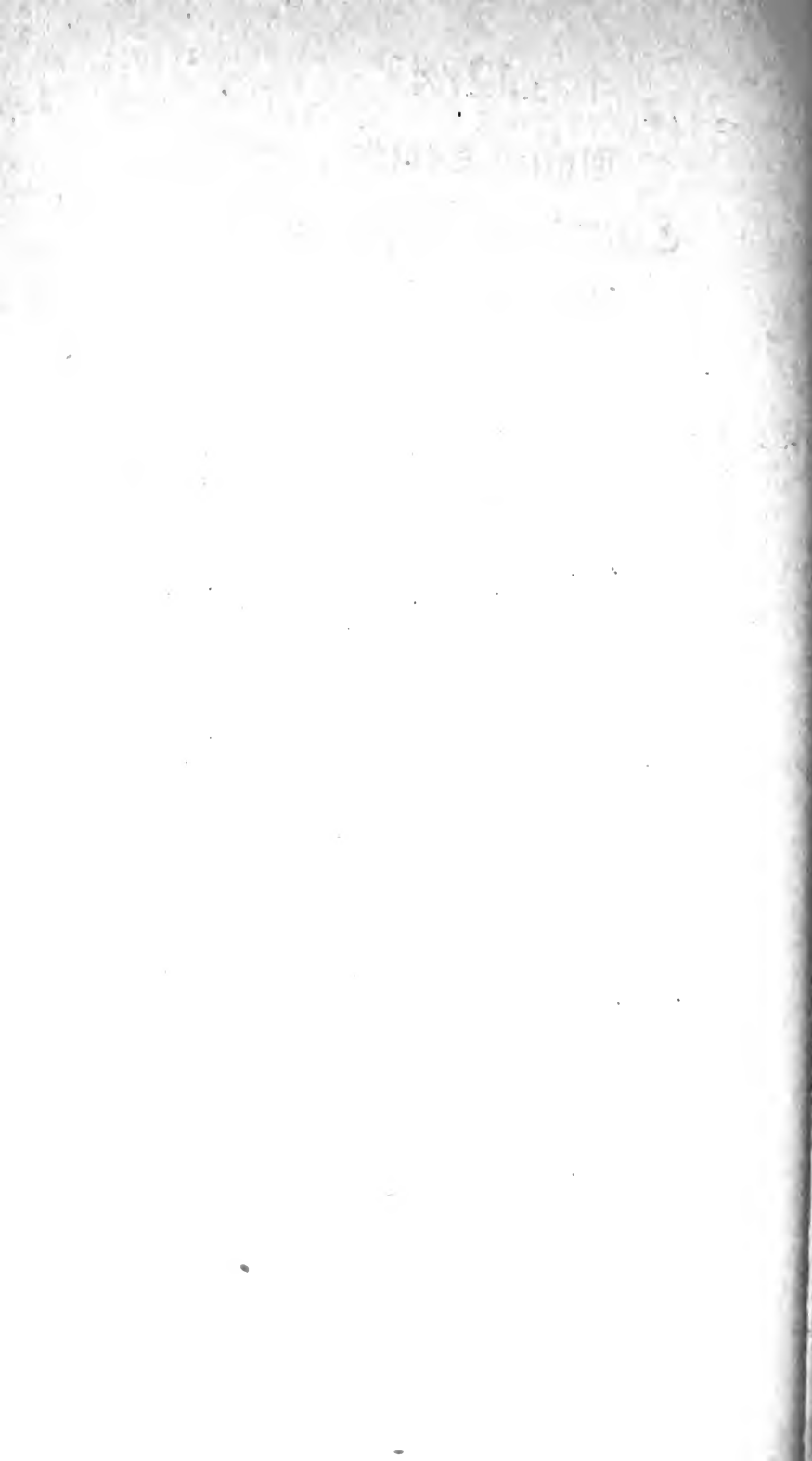
vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of
BRICK O' GOLD, a Corporation,
Plaintiff,

vs.

J. R. NORBERG, an Individual, Doing Business
as NORBERG ADJUSTMENT BUREAU;
HOPE D. PETTEY, WILLIAM B. DOLPH,
ALICE HUSTON LEWIS, HELEN S.
MARK, ELIZABETH N. BINGHAM, D.
WORTH CLARK, EDWIN P. FRANKLIN,
GLENN A. DOLPH, Individually and Doing
Business as Co-partners Under the Firm Name
and Style of KJBS BROADCASTERS;
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

COMPLAINT TO RECOVER PREFERENCE

Plaintiff complains of the above-named defend-
ants and each of them and for cause of action
alleges:

I.

Defendants, First Doe, Second Doe and Third
Doe, are the fictitious names of defendants whose
true names are unknown to plaintiff, and plaintiff
asks that when such true names are discovered that
this Complaint may be amended by inserting such

true names in the place and stead of such fictitious names.

II.

This action arises under the Act of Congress relating to Bankruptcy as amended in 1938, U.S.C., Title 11, Section 96(b), as hereinafter more fully appears.

III.

On November 9, 1949, an involuntary petition in bankruptcy was filed against Brick O' Gold, a corporation, in the Southern Division of the United States District Court for the Northern District of California, and on November 28, 1949, said Brick O' Gold, a corporation, was adjudicated a bankrupt by said Court. Thereafter, and on February 14, 1950, plaintiff was appointed Trustee of the estate and effects of said bankrupt and presented his bond, as required by law, which was approved by said Court and ever since plaintiff has been, and now is, the duly appointed, qualified and acting Trustee of the estate of said bankrupt, all of which appears by the records of the Clerk of the above-entitled Court, in those certain proceedings entitled "In the Matter of Brick O' Gold, a corporation, Bankrupt," and being No. 38320-G, In Bankruptcy, of said records.

IV.

That within four (4) months next preceding the filing of said involuntary petition in bankruptcy and more particularly on or about September 13, 1949, and in the District aforesaid, and while said Brick O' Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment

on said September 13, 1949, to be levied on property belonging to said Brick O' Gold, a corporation, bankrupt, which said writ of attachment was issued in that certain action entitled "J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, Plaintiff, vs. Brick O' Gold, Inc., a corporation, et al., Defendants," being action No. 258127 of the files and records of the Clerk of the Municipal Court of the City and County of San Francisco, State of California, which said action was filed on or about September 12, 1949, on a claim assigned to said defendant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, by said defendants, KJBS Broadcasters, a co-partnership; and thereafter said defendants caused a writ of execution to be levied on the property of the bankrupt, as a result of which there came into the possession of said respondents the total sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40); that at the time of the levy of said writs, as aforesaid, said defendants were generally and wholly unsecured creditors of said Brick O' Gold, a corporation, bankrupt, and that in procuring, pursuant to the levy of said writs of attachment and execution, the said amount of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40), it enabled said defendants, as such creditors, to obtain payment of a greater percentage of their said debt than other creditors of bankrupt of the same class.

V.

That at the time of the levy of the writ of attach-

ment on said September 13, 1949, and the writ of execution on or about October 5, 1949, said defendants and each of them had reasonable cause to believe that the enforcement of said levies of attachment and execution would effect a preference and that defendants and each of them at the time of said levies and at all times thereafter knew and/or had reasonable cause to know that said bankrupt was then and there insolvent.

VI.

That other of said bankrupt's general and wholly unsecured creditors have duly filed in the bankruptcy proceedings of the said Brick O' Gold, a corporation, bankrupt, duly verified and proper proofs of their respective claims against its said estate, which said claims have been allowed, and that the assets of said bankrupt estate are insufficient to satisfy the claims for said creditors in full.

Wherefore, plaintiff prays judgment against said defendants and each of them for the said sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40) plus legal interest from and after the date of the filing of this action to the date of judgment herein, for costs herein incurred and for such other, further and proper relief as may be meet in the premises.

MAX H. MARGOLIS,

JAMES M. CONNERS,

By /s/ JAMES M. CONNERS,

Attorneys for Plaintiff.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

James M. Conners, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Harry F. Meilink, the Trustee named in the foregoing petition; that he makes this verification for and on behalf of said Harry F. Meilink for the reason that said Harry F. Meilink is temporarily outside of the County wherein affiant maintains his office; that he has read the petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein alleged on information or belief, and as to such matters he believes it to be true.

/s/ JAME M. CONNERS.

Subscribed and sworn to before me this 19th day of May, 1950.

[Seal] /s/ C. J. DORAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now defendants above named, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenn G. Dolph, individually and doing business as copartners under the firm name and style of KJBS Broadcasters, and answering plaintiff's complaint on file herein admit, deny, and allege as follows, to wit:

I.

Answering paragraph IV of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained, save and except that said defendants admit that on or about September 12, 1949, an action was filed by defendant herein, J. R. Norberg, in the Municipal Court of the City and County of San Francisco, and being Number 258127, and in said action, a number of Writs of Attachment were levied upon a number of alleged debtors of said purported bankrupt, and thereafter a judgment was obtained against said alleged bankrupt, and thereafter a Writ of Execution was levied upon several alleged debtors of said purported bankrupt, and on or about October 5, 1949, pursuant to said Writ of Execution, defendant J. R. Norberg herein obtained the sum of \$1,076.40.

II.

Answering paragraph V of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained, save and except as to the matters hereinafter specifically admitted.

III.

Answering paragraph VI of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained.

Wherefore, defendants pray that they be hence dismissed with their costs.

/s/ WILLIAM BERGER,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 9, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled Court on August 1, 1950, Max H. Margolis and James M. Connors appearing by and through Max H. Margolis as attorneys for plaintiff above named, and William Berger appearing as attorney for the defendants above

named, and evidence both oral and documentary having been introduced and the continued trial of said cause having been set over to August 2, 1950, at which time additional evidence both oral and documentary having been introduced, at the conclusion of which the matter having been submitted to the Court for decision, the Court finds the facts and states the conclusions of law as follows:

Findings of Fact

From the evidence both oral and documentary the Court finds:

1. The action alleged in plaintiff's complaint arises under the Act of Congress relating to Bankruptcy as amended in 1938, U.S.C. Title 11, Section 96b.

2. On November 9, 1949, an involuntary petition in bankruptcy was filed against Brick O' Gold, a corporation, in the Southern Division of the United States District Court for the Northern District of California, and on November 28, 1949, said Brick O' Gold, a corporation, was adjudicated a bankrupt by said Court; and thereafter on February 14, 1950, Harry F. Meilink, plaintiff above named, was appointed Trustee of the estate and effects of said bankrupt corporation and presented his bond, as required by law, which was approved by this Court, and ever since plaintiff has been and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt, all of which appears from the records of the Clerk of the above-entitled Court

in those certain proceedings entitled "In the Matter of Brick O' Gold, a corporation, Bankrupt," and being No. 38320-G, In Bankruptcy, of said records.

3. That within four (4) months next preceding the filing of said involuntary petition in bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O' Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O' Gold, a corporation, bankrupt, which said writ of attachment was issued in that certain action entitled "J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, Plaintiff, vs. Brick O' Gold, Inc., a corporation, et al., Defendants," being action No. 258127 of the files and records of the Clerk of the Municipal Court of the City and County of San Francisco, State of California, which said action was filed on September 12, 1949, on a claim assigned to defendant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, and also known as James R. Norberg, by the defendants, KJBS Broadcasters, a copartnership; and thereafter defendants, on October 5, 1949, caused a writ of execution to be levied on the property of the bankrupt, as a result of which there came into the possession of defendants the sum of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40) which represented payment in full of defendants' claim; that at the time of the levy of the writ of

attachment defendants were generally and wholly unsecured creditors of said Brick O' Gold, a corporation, bankrupt; and in procuring, pursuant to the levy of said writs of attachment and execution, the said amount of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40) which was the full amount of defendants' claim, it enabled defendants, as creditors of bankrupt, to obtain a greater percentage of their said debt than other creditors of bankrupt of the same class.

4. That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent.

5. That other of said bankrupt's general and wholly unsecured creditors have filed in the bankruptcy proceedings of the said Brick O'Gold, a corporation, bankrupt, duly verified and proper proofs of their respective claims against its estate, which claims have been allowed and that the assets of said bankrupt estate are insufficient to satisfy the claims of said creditors in full.

Conclusions of Law

1. That plaintiff, Harry F. Meilink, as Trustee of the estate of Brick O'Gold, a corporation, bankrupt, have judgment against the defendants, J. R.

Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, in the sum of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40), plus interest at the rate of seven per cent (7%) per annum from and after May 24, 1950, the date of the filing of the above-entitled action, together with plaintiff's costs.

2. That the complaint as to First Doe, Second Doe and Third Doe be dismissed.

It Is So Ordered and counsel for plaintiff will submit appropriate judgment in accordance herewith.

Dated: San Francisco, in said District; August 9th, 1950.

/s/ J. WATIES WARING,

United States District Judge.

Receipt of Copy acknowledged.

Lodged August 3, 1950.

[Endorsed]: Filed August 9, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of
BRICK O' GOLD, a Corporation,
Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business
as NORBERG ADJUSTMENT BUREAU;
HOPE D. PETTEY, WILLIAM B. DOLPH,
ALICE HUSTON LEWIS, HELEN S.
MARK, ELIZABETH N. BINGHAM, D.
WORTH CLARK, EDWIN P. FRANKLIN,
GLENN A. G. DOLPH, Individually and Do-
ing Business as Co-Partners Under the Firm
Name and Style of KJBS BROADCASTERS;
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

JUDGMENT AFTER TRIAL BY COURT

This cause came on regularly for hearing before the above-entitled Court on August 1, 1950, and evidence, both oral and documentary, having been introduced and the further trial of said matter having been continued to August 2, 1950, at which time additional evidence, both oral and documentary, having been introduced and the matter having been submitted for decision, it was,

Ordered, Adjudged and Decreed that plaintiff,

Harry F. Meilink, as Trustee of the estate of Brick O'Gold, a corporation, bankrupt, have judgment against defendants, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, in the sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40), together with interest thereon at the rate of seven per cent (7%) per annum from and after May 24, 1950, and costs of action incurred herein, and that plaintiff have execution therefor.

Dated: San Francisco, in said District, August 9, 1950.

/s/ J. WATIES WARING,

U. S. District Court Judge.

Approved as to form, as provided in Rule 5(d).

/s/ WILLIAM BERGER,

Attorney for Defendants.

Lodged August 3, 1950.

[Endorsed]: Filed August 9, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
CIRCUIT COURT OF APPEALS

Notice is hereby given that the defendants above named, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, hereby appeal to the Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment made and entered in this action on or about August 9, 1950.

/s/ WILLIAM BERGER,

Attorney for Defendants
Above Named.

[Endorsed]: Filed September 7, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court in the above-

entitled case, and that they constitute the Record on Appeal, as designated by the parties, to wit:

Complaint to Recover Preference.

Answer.

Findings of Fact and Conclusions of Law.

Judgment After Trial by Court.

Notice of Appeal to Circuit Court of Appeals.

Designation of Record on Appeal.

Supersedeas Bond and Bond on Appeal.

Appellee's Designation of Additional Portions of the Record on Appeal Under Rule 75(a).

Affidavit of Service by Mailing of Additional Portions of the Record on Appeal.

Order Extending Time to Docket.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6.

Defendants' Exhibits Nos. A, B, C and D.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of November, A.D. 1950.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12747. United States Court of Appeals for the Ninth Circuit. J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. North Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, Appellants, vs. Paul W. Ryan, Trustee of the estate of Brick O' Gold, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business
as NORBERG ADJUSTMENT BUREAU;
HOPE D. PETTEY, WILLIAM B. DOLPH,
ALICE HUSTON LEWIS, HELEN S.
MARK, EDWIN P. FRANKLIN, GLENNA
G. DOLPH, Individually and Doing Business
as Co-partners Under the Firm Name and
Style of KJBS BROADCASTERS; FIRST
DOE, SECOND DOE and THIRD DOE,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, August 1, 1950

Appearances:

For the Plaintiff:

MAX H. MARGOLIS and
JAMES M. CONNERS, ESQ.

For the Defendants:

WILLIAM BERGER, ESQ.

Tuesday, August 1, 1950, at 10:00 o'Clock A.M.

The Clerk: Meilink, Trustee, vs. Norberg, et al., for trial.

Mr. Margolis: Ready for the plaintiff.

Mr. Berger: Ready for the defendant.

The Court: Gentlemen, I had just a moment to glance at the pleadings. The real issue here is as to the insolvency of the bankrupt at the time of the judgment and execution, and the knowledge of the parties obtaining same, isn't it?

Mr. Margolis: That is correct.

The Court: That is the issue.

Mr. Berger: At the time of the attachment, your Honor.

The Court: At the time of the attachment.

Mr. Margolis: I was going to make an opening statement and point that out, two matters which we are required to prove, as your Honor has indicated.

The Court: Very good. Gentlemen, you may proceed.

Mr. Margolis: We will call as our first witness on behalf of the plaintiff Mr. Paul Loudolph.

PAUL LOUDOLPH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Paul Loudolph.

The Clerk: Proceed. [2*]

(Testimony of Paul Loudolph.)

Mr. Margolis: I showed counsel the original in the clerk's office, the involuntary petition and schedules, being the bankruptcy proceedings No. 38320G, which I want to show the witness, your Honor. The pleadings, as already indicated, constitutes the filing of the involuntary petitioned as denominated and set forth in paragraph 3.

The Court: And the appointment and qualification of the trustee.

Mr. Berger: Is that the entire file of the bankruptcy court?

Mr. Margolis: This is, Mr. Berger, the file from the Clerk's office here, the United States District Court, and I have here the claims which were filed with the referee in bankruptcy.

Direct Examination

By Mr. Margolis:

Q. Mr. Loudolph, I show you file No. 38320G being the proceeding in the matter of Brick O'Gold, bankrupt, and direct your attention to the schedules and ask you whether this is your signature at the foot of each and every page of the schedules?

A. That is my signature.

Q. And you were President of the bankrupt corporation, is that correct? A. Yes, sir.

Q. Prior to executing and signing the schedules did you [3] examine all the information contained on the several pages which comprise these schedules? A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. And who gave that information to you, it was your attorney who prepared it for you, isn't that correct? A. Correct.

Q. Now, can you tell us on or about September 12th, or on September 12, 1949, whether all of the assets of the bankrupt corporation, at the fair market value, was sufficient to pay all of your creditors in full?

Mr. Berger: Just a moment, that is calling, not only for an opinion and conclusion, but also calling for hearsay evidence and the records, if he has records, would be the best evidence, and so no foundation has been laid for a question of that kind.

The Court: I don't think that is too general. I think he can tell what his assets were and what his liabilities were.

Mr. Margolis: I think also, if I may be heard, your Honor, an individual owner of property, of a corporation, where one is familiar with what the corporation has is in the best position to tell the value of it. That was the purpose of it.

The Court: Yes, but I think perhaps instead of saying corporation you might say I have a dollar and I owed \$10, and the judge can draw a conclusion.

Mr. Margolis: Very well, your Honor. [4]

Q. Can you tell us, Mr. Loudolph, were you in active conduct of the corporation's business in September, 1949? A. Yes, sir.

Q. Do you know what the assets and liabilities of the corporation consisted of? A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. Can you tell the Court substantially what the assets were on September 12, 1949?

A. Well, the market value of the assets were approximately——

Mr. Berger: Just a moment. I will object to that, your Honor. The question was what were the assets, not what were the value of the assets.

The Court: What were the assets, and then you may value them. What did the assets consist of, real estate, personal property, manufacturing merchandise?

A. The assets consisted of plant and equipment, accounts receivable, notes receivable, very little cash, truck equipment.

Q. (By Mr. Margolis): What was the general nature of the business so the Court will understand the situation?

A. The general—the business we had was a manufacturing plant in Redwood City where we manufactured and distributed the products that were sold. We used it as a warehouse, products that were sold in 13 franchise stores. We had 13 dairy product stores, supplied them from a central warehouse in Redwood City.

The Court: What was the general nature of the products you [5] manufactured?

The Witness: Practically our main product was ice cream, and sold cheese and eggs and butter, milk.

(Testimony of Paul Loudolph.)

Q. Did the corporation own this equipment you speak of free and clear?

A. No, we had a chattel mortgage with the Pacific National Bank, San Francisco.

Q. And was that property subsequently sold by the bank? A. Yes, they sold it.

Q. And what was the balance due and owing the bank at the time of the levy of this attachment on September 12, if you know?

A. \$9,000, plus a small amount of interest, but the loan was \$9,000.

Q. And what did the property bring upon sale?

A. \$5999.99.

Q. \$5999.99. Now, were all of the accounts receivable collectable on September 12, 1949?

A. No, one of our main troubles was that the accounts receivable were not collectable. The stores were not doing well.

Q. Now, you have set forth here under schedule A-3 the list of the names, addresses and amounts of the unsecured creditors, is that correct? Will you take a look at the schedules which you signed? [6]

A. This is a correct list of our creditors.

Q. And now much was owing at the time of the execution of the schedules?

The Court: That was in November?

Mr. Margolis: That is correct.

A. About \$43,000 on these unsecured. I notice some salaries in here, might make that a little higher.

(Testimony of Paul Loudolph.)

Q. Yes. Was the amount more or less on September 12, 1949?

A. No, it was approximately the same because we got—our situation became so bad that we had to pay cash for everything. We operated on a COD basis; everybody put us on a COD.

Q. Now, outside of the accounts receivable, did you have any other assets?

A. We had some notes on balance due of stores that was pledged to the Pacific National Bank along with the plant and equipment.

Q. Did you have any equity in those notes on September 12, 1949?

Q. Yes, we had some equity—I don't know, because the bank still has the notes and they realized \$6000, or \$5999, and I don't know just how they came out on the balance. I know it made some settlements, but they were very low.

Q. Were all of the equity or value of the notes plus whatever could be recovered on the accounts receivable and any other assets you had sufficient to pay the general creditors? [7] A. No.

The Court: What were the accounts receivable as shown in the petition for bankruptcy? Aren't they set out in the assets?

Mr. Margolis: They are, Your Honor.

The Witness: I could give them at the time very closely but—

Q. (By Mr. Margolis): Look at schedule B-3. Probably not familiar with the caption, the witness isn't.

(Testimony of Paul Loudolph.)

The Court: Yes, you find it for him.

Q. (By Mr. Margolis): The court wants to know what the accounts receivable were, Mr. Loudolph? You find them under schedule B-3.

A. They are in a total of approximately \$13,500, some cents.

Q. Did you have any other assets?

The Court: You say those accounts receivable were not very good, there were not a great many of them collectable?

The Witness: They weren't collectable because the stores were not making money. We gave this credit to hope for the better, which never happened. If we ever tried to collect these the stores would have to close.

Q. (By Mr. Margolis): Did you owe any taxes also, Mr. Loudolph? A. Yes, sir.

Q. Will you look at Schedule A-1 and tell how much in taxes you owed; schedule A-1 as set forth there. A. \$976. [8]

Q. I notice also on the schedule A-4, signed by yourself as president of the Brick O'Gold, that there was an obligation to the Morris Plan in the sum of \$14,866.

A. That is a contingent liability. The stores bought—when the people bought the stores they financed with the Morris Plan, some of them did. We went on the notes along with them as a contingent liability.

Q. And at the time of the attachments, Sep-

(Testimony of Paul Loudolph.)

September 12, 13, 1949, did you owe the Morris Plan any money?

A. Did we owe them besides this contingent liability?

Q. Yes.

A. We owed them a small amount, maybe \$2000. It was covered by the truck equipment and automobile.

Q. I see.

Mr. Margolis: Now, I exhibit to counsel, Your Honor, the claims from the clerk's office being 31 in number.

The Court: Unsecured creditors?

Mr. Margolis: That is correct, Your Honor. I haven't run a total on them as yet, Your Honor. I just picked them up this morning. They represent the claims approved and allowed. Subject to checking, however, if Your Honor please, in that file of secured claims, which of course we have to leave out in our computation of the unsecured creditors, for the purpose of having counsel examine the file so that I can exhibit it to the witness—— [9]

The Court: Can you state whether they are approximately the same as that shown in the petition schedules?

Mr. Margolis: Schedules—that, I don't know without checking, Your Honor. Often times in the matters creditors phone in to inquire what possible assets are in a certain case and won't go to the trouble or expense of a Notary fee to prepare a claim. These claims came into the clerk's office;

(Testimony of Paul Loudolph.)

there are 41. There may be one or two more secured claims. There are, however, sufficient unsecured claims to my knowledge to establish the percentage theory which we allege is one of the elements and with which there is no dispute.

Mr. Berger: I don't know what he means by dispute, I don't know if it is a disputed fact. I haven't gone into the matter. I feel from our evidence we will prove that they were not even entered, and don't have any point in going into these claims, but I can't see—I don't dispute them; however, it is assumed I must dispute them, I don't know anything about them, I haven't seen them until now. However, to save the time of the Court, if the Court desires to admit them, giving me a chance later——

The Court: Yes, you may do that, and I should like, before we close the case to know the total, have a total run.

Mr. Margolis: I will undertake to do that, Your Honor, and I might add if counsel is correct in part as we have stipulated at the beginning of the case the only issues is the [10] questions of insolvency of the corporation and the knowledge by the defendants and this attempt to offer these claims, merely information for the Court. However, if they are immaterial they will be disregarded. If Your Honor wishes to know the amount I will run a total and counsel can check it and I will offer it to the Court at the afternoon session.

The Court: After the noon recess give me a total.

(Testimony of Paul Loudolph.)

Mr. Margolis: Yes.

Q. The schedules which you hold show indebtedness in excess of \$40,000, the schedules you hold in your hands, unsecured creditors?

A. Yes, sir.

Q. And the assets which you have told us about comprise these accounts receivable, and you mentioned something about some personal property which was mortgaged, and did the corporation receive any equity out of the sale of that property?

A. No, sir, you mean the plant and the equipment?

Q. That is correct. A. No, it did not.

The Court: On any real estate?

A. No, sir, it was all machinery and office equipment.

Q. (By Mr. Margolis): The corporation didn't own any real estate? A. No, sir. [11]

Q. No stocks or bonds? A. No, sir.

Q. And did the condition of the corporation between September 12 and the date of the filing of the involuntary petition on November, I believe it was the 9th—

The Court: November 9th.

Q. November 9, get better or worse?

Mr. Berger; Just a moment. If Your Honor please, that certainly is calling for a conclusion unless some proof either by books or records, as to whether they got better or worse. Merely a statement, a bald statement without any foundation whatsoever—I will object to that statement.

(Testimony of Paul Loudolph.)

Mr. Margolis: It seems to me if the witness was an active operator of the business, Your Honor, he would be one who would know whether the business improved or whether it didn't.

The Court: Ask him generally what the condition of the business was on September 12.

Mr. Berger: The point in issue, Your Honor, would be that in September of 1949, but not in November as to whether it changed or not, because the books themselves would disclose that.

The Court: He may state on September 12, 1949, what was the condition of the business, approximately what were the assets, liabilities and so forth. [12]

Q. (By Mr. Margolis): Will you answer the question?

A. The situation of the corporation on September 12 was just about the same as it was in this.

Q. As set forth in the schedules? A. Yes.

Mr. Berger: I move to strike out the answer as not responsive.

The Court: I will allow that in. He stated on November 12, what the condition was. He says as President of the corporation that on September 12 it was in approximately the same condition.

The Witness: I would say the only change was some labor. We weren't paying our labor in that period, and got slightly worse because of the labor, by buying everything on COD, on a COD basis.

The Court: Weren't paying your labor?

The Witness: No.

(Testimony of Paul Loudolph.)

The Court: You mean you didn't keep up with your wages? A. That is right, sir.

Q. (By Mr. Margolis): And why didn't you pay your labor?

A. We didn't have the money.

Q. Now, do you know Mr. Norberg who is sitting here in the Courtroom? A. Yes, sir.

Q. And can you tell the Court when you first met Mr. Norberg?

A. I first met Mr. Norberg in what we call the Lakeside Store [13] on Ocean Avenue.

Q. Could you tell us the date, approximately?

A. About the 8th of September.

Q. Of 1949?

A. 1949, right in there. It was a Saturday.

Q. Who was present at that meeting?

A. Mr. Norberg, Miss Lee, who is in the courtroom.

Q. She was an officer of the corporation?

A. Yes, sir.

Q. Yourself and Mr. Norberg?

A. Yes, sir.

Q. Can you tell the Court the reason for Mr. Norberg's visit or invitation to the Lakeside place of the bankrupt corporation? A. I think——

The Court: Mr. Margolis, isn't it the rule of this Court that counsel stand?

Mr. Margolis: I beg your pardon; I am sorry.

Q. Go ahead.

A. Mr. Norberg phoned me in the morning. He said he wanted to have a talk with me, and I said,

(Testimony of Paul Loudolph.)

well, we could talk if he wanted to come up on a Saturday afternoon. He said, I will come right up, and he came up and I had some facts and figures at my disposal there.

Q. Did he tell you what he wanted to come up about?

A. Told me he wanted to come up about KJBS indebtedness. [14]

Q. Yes. And he came out to the place on Lakeside Street? A. Yes.

Q. How long a time did he spend there?

A. Well, we had a long chat, probably half hour, twenty-five minutes, half hour.

Q. Can you tell the court what you said and what Mr. Norberg said in response to your statements and visa versa?

A. Mr. Norberg was very cooperative with me and we went over—I had a financial statement, I went over the financial statement and the conditions of the corporation with Mr. Norberg. I explained to him what our difficulties were, that we were seeking new capital and we had a couple of good prospects to come in with us and if the people we owed money to would go along with us we might be able to pull it out, but if we didn't we weren't to get any new capital we couldn't pay anyway. And Mr. Norberg was cooperative and I gave him all of the information that I had, explained the situation about the stores, they weren't doing well and although it looked like we had some accounts receivable some of them were uncollectable and that we

(Testimony of Paul Loudolph.)

were just in bad shape if we didn't get this new capital in.

Q. And what did Mr. Norberg say in response to your explaining to him what the situation was from this financial statement, if you can tell us?

A. Mr. Norberg didn't comment very much, more or less listened [15] to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

A. Well, the main theme of the conversation, as I was explaining to Mr. Norberg the serious condition of the corporation and the figures.

Q. Did you discuss with him the financial condition of the corporation at that time?

A. Yes, I had the financial statement with me.

Q. And did you go over it in detail, the items set forth in the financial statement?

A. Yes, we did, I went over with him——

Q. And what if anything did he say at the conclusion of that conference?

A. Well, the best of my knowledge he said he didn't know what he was going to do. My efforts with Mr. Norberg were to try and convince him that there was no value in starting an action, if he did something like that it would ruin our chances to get

(Testimony of Paul Loudolph.)

new capital, and there was no decision made by Mr. Norberg at that meeting. [16]

Q. Did you discuss with him that you were having financial difficulties at that time?

A. Yes, we were definitely.

Q. And you told him all the details in connection with the business?

A. It was common knowledge. Even KJBS, his client, had been talking with us.

The Court: Yes, he could see what was coming.

Q. Yes. Just tell us, you stated to Mr. Norberg at that time with respect to the financial condition of the corporation and enumerated that it is common knowledge?

A. Yes, I went over it with great detail with Mr. Norberg.

Q. And he left after you had about a half hour's conference? A. Yes.

Q. Within a few days this attachment suit was brought? A. Yes.

Q. Did you have any discussions or conferences with Mr. Norberg after the attachment?

A. Yes, Mr. Norberg closed up two of our stores. He worked closely with a Mr. Kolb.

Mr. Berger: I move to strike the answer as not responsive to the question, any other conferences with Mr. Norberg after that time, only confine himself to the question.

The Court: I don't think—he says that he closed the stores by this attachment and worked through Mr. Kolb, the [17] attorney.

Mr. Berger: I understood the question to be any

(Testimony of Paul Loudolph.)

other conferences with Mr. Norberg after that time.

Mr. Margolis: I will get to that point, Your Honor.

Mr. Berger: I thought that was the question.

The Court: I don't think we have come to that point.

Q. (By Mr. Margolis): Now, subsequent to the levy of the attachment, which is stipulated as September 13, 1949, did you meet with Mr. Norberg?

A. Met with Mr. Norberg in Mr. Kolb's office.

Q. Who is Mr. Kolb? He is an attorney?

A. He is an attorney.

Q. Representing a creditor?

A. Yes, Pacific Mechanical and Electrical Company.

Q. What?

A. Pacific Mechanical and Electrical Company.

Q. One of the creditors listed in the schedules?

A. Yes, sir.

Q. How soon after the attachment did that conference take place, Mr. Loudolph?

A. Well, it was the latter part of the same week that the attachment was levied. The purpose of the meeting was to—with Miss Lee and myself were there and we tried to get, release those attachments.

Q. Who called the meeting? [18]

A. Mr. Kolb called the meeting.

Q. He is representing this Pacific Mechanical and Electrical Company?

A. Yes. The meeting, I might say, was called by both of those gentlemen, because they were both present.

(Testimony of Paul Loudolph.)

Q. Yes. And who asked you to appear there, Mr. Norberg or Mr. Kolb? A. Mr. Kolb.

Q. Could you tell us substantially what was said, naming each one who said it, as you recall it now?

A. Well, we went over it, the figures again.

Q. What figures are you talking about?

A. The financial statement of the corporation and our difficulties and again the same story as was told Mr. Norberg. I told Mr. Norberg out at the Lakeside Store we were trying to get new capital, if they did that they were killing our chances to get new capital while these stores were closed and that we would like to have them release the attachment to open them up again and at that time Mr. Norberg and Mr. Kolb tried to get me to make a preference on their claim. They tried to get me to give a note on the corporation and personally guarantee Miss Lee and myself, and I refused to do that. I said that would be an act of bankruptcy, and it would be a preference. Mr. Kolb says we had already committed bankruptcy when this accounting company had sued us some months before and [19] that we should go ahead and give them the preference. But I wouldn't give them the preference, and Mr. Norberg got a little heated. Mr. Norberg made the statement that he didn't care about—I brought up the fact that how could I give a preference to one against all of these others, and he said he had no interest in these at all, that he was interested in getting his money, not interested in the fact we

(Testimony of Paul Loudolph.)

owed the other people money, and he wanted his and he was going to collect it.

Q. Did you explain to him that you owed other people money and couldn't pay it?

A. Yes, sir. On the financial statement there was over \$3000 accounts payable.

Q. And the assets you told us was substantially what you have related a few moments ago?

A. Yes, sir, they did not change.

Q. Now, how long did that conference last, approximately?

A. I would say that conference lasted—these attorneys, as you know, some of the attorneys—his phone keeps ringing, probably in there, probably 35 minutes.

Q. But the actual——

A. But the interruptions——

Q. You were there 35 minutes with the interruptions, but the actual conference we are speaking about was going on among the various parties, including yourself, the other attorney, Mr. Norberg and Miss Lee, about how much time would that take? [20]

A. I would say 20 full minutes.

Q. 20 full minutes. Now, was there anything else said during that time that you can recall by any of the parties; name them and state what was said?

A. Mr. Norberg left then and I talked with Mr. Kolb. I was still trying to get him to release these two stores.

(Testimony of Paul Loudolph.)

Q. Up to that point I am going to stop you, it wasn't said in the presence of Mr. Norberg, I don't want anything mentioned about anything else, I don't think that would be——

The Court: Only when Norberg was present.

Mr. Margolis: That is correct.

Q. Now, was there anything else that transpired when Mr. Norberg was present? Did you hear what I said, I don't want anything stated about what was said after Mr. Norberg left.

A. I understand.

Q. Can you tell us anything else, if anything did take place?

A. Well, Mr. Norberg, he took a look at our financial statement with Mr. Kolb. They seemed quite optimistic. He said they will close this place up and we will get a dividend of something like 75 per cent. I said, if you close this business up you won't get any dividend, so far as I can see.

Q. Then the meeting broke up, did it?

A. Yes, sir.

Q. Did you speak with Mr. Norberg subsequent to that meeting and prior to the execution in October; was there any other [21] conference held after that meeting?

A. You're speaking before we had a meeting again with Mr. Kolb?

Q. I mean with Mr. Norberg.

A. No, not to the best of my knowledge.

Q. You say no. Did Mr. Kolb's client that you mentioned get any monies during that time?

(Testimony of Paul Loudolph.)

Mr. Berger: Just a moment, I think that is beyond the issue here.

The Court: I rather think that is immaterial.

Mr. Morgolis: Very well, Your Honor.

Q. And then in October execution was levied and the monies were picked up from these accounts receivable, is that correct?

A. I know it is correct, but I have no knowledge of it.

Q. Of the amount?

A. What they did by the attachment.

Mr. Margolis: No question in the pleadings the amount set forth in the complaint is conceded.

The Court: The amount is admitted, isn't it?

Mr. Margolis: That is correct.

Mr. Berger: Yes, your Honor.

Mr. Margolis: You may cross-examine.

Cross-Examination

By Mr. Berger:

Q. Mr. Loudolph, you are the President of the corporation called Brick O'Gold? [22]

A. I was at that time, sir.

Q. At that time, yes. And did the corporation have stock issued? A. No, sir.

Q. Was there ever any stock issued at all by the corporation to anyone? A. No, sir.

Mr. Margolis: We object to the question, may it please the Court. It is incompetent, irrelevant and immaterial, not within the issues.

(Testimony of Paul Loudolph.)

The Court: Well, I don't see where it is within the issues, but it may be.

Mr. Berger: For this reason, Your Honor.

The Court: Was it a corporation?

Mr. Berger: It was a corporation, admitted it was incorporated, I assume it was.

The Witness: Yes, sir.

Q. (By Mr. Berger): Had this corporation a franchise from the State of California?

A. Yes, sir.

Q. And did the corporation ever make any application to issue stock? A. No, sir.

Q. It did not?

A. We were preparing when we got into [23] difficulties.

Q. And did the corporation or franchise, show how many shares you would own or how many shares you would have in it?

Mr. Margolis: We renew the objection, Your Honor, no issue wherein the corporation is the bankrupt's business as a trustee.

The Court: I rather think that I could very well find out what the purpose it——

Mr. Berger: I will agree to a motion to strike if it is immaterial, Your Honor.

Q. Now, Mr. Loudolph, did you invest any cash in the corporation yourself? A. Yes, sir.

Mr. Margolis: May the objection go to all this line of questions so I don't have to interrupt the Court?

(Testimony of Paul Loudolph.)

The Court: Objection to all this line of questions.

Q. And did you make application—you say your application was being prepared? A. Yes, sir.

Q. And did you show how much stock was going to be issued to you? A. Yes, sir.

Q. How many shares?

A. The Attorney—in the amount of 15—\$16,500.

Q. \$16,500 would be issued to you, is that correct? A. Yes, sir.

Q. Now, did you pay into the corporation [24] \$16,500?

Mr. Margolis: Just a moment——

Mr. Berger: That is an asset of the corporation if he is obligated to pay it. That is the purpose of the question.

Mr. Margolis: At that point I wish to object to the question as incompetent, irrelevant and immaterial, not within the issues of this case.

Mr. Berger: He testified what the corporation——

The Court: That might be an issue as to whether it was bankrupt or not.

Mr. Berger: That is what—if it had an asset not listed they have a claim that isn't listed and may not be bankrupt. We don't know, we take the facts as we find them.

The Court: That is all adjudicated in bankruptcy, isn't it?

Mr. Berger: Those inventory sheets——

Mr. Margolis: That is correct, Your Honor, it

(Testimony of Paul Loudolph.)

is res judicata. I don't think at this time we can go into that question.

The Court: The District Court has adjudicated this corporation a bankrupt.

Mr. Berger: That is correct.

The Court: You are not attempting to upset that?

Mr. Berger: Going to assets that the bankruptcy court didn't know about.

The Court: Any more assets, that is just good news for the creditors. [25]

Mr. Berger: Find out, maybe it slipped, at that time there were sufficient assets if he had paid his obligation under the stock.

The Court: You may see if there was, fixing, if it was in November when it went bankrupt.

Mr. Berger: That is what he states.

The Court: That is about \$43,000 unsecured creditors and assets are very little.

Mr. Berger: Yes. Now, may I have that question answered whether or not he has paid the \$16,500 for the stock to the corporation?

The Court: Well, I will allow him to answer that.

A. The exact figure did I pay it in cash?

The Court: Did what?

The Witness: Did I pay it into the corporation?

Q. Yes.

A. My interest payment was in the form of a cashier's check made out to the Pacific National Bank in the sum of \$15,000, which was turned over

(Testimony of Paul Loudolph.)

to the corporation, deposited to the corporation. The balance was—I turned over a Chevrolet 1946 four-door sedan which I valued at that time at \$1500, and the corporation subsequently paid about \$400 off that I owed on it, and that—this is what my contributions into the corporation were, in the form of a cashier's check.

Q. Was it your money? [26]

A. It was my money.

Q. Now, any other stock issued to anyone else, or should have been issued to anyone else, members of the corporation? A. Yes, sir.

Q. Did they pay cash for the stock?

A. Every nickel.

Q. All right. Now you had a lease on the premises, did you not? A. Yes, sir.

Q. Did you have any security on the lease?

A. Yes, sir, \$1500.

Q. And what happened to that security?

A. We—well, I guess kept it as a security on the lease when we no longer paid.

Q. Coming back to the question of assets of the corporation as of September, 1949, you have your list of liabilities and assets set forth in this schedule. Where did you get this information, Mr. Loudolph?

A. The information from our assets, from our liabilities?

Q. Yes.

A. The last financial statement that we had was prepared by Burrows C.P.A.

Q. Do you have that financial statement?

(Testimony of Paul Loudolph.)

Q. I turned over the papers of the corporation to Mr. Meilink when he was appointed trustee. He asked me to send every paper. [27]

Mr. Berger: That is why I asked that question, if these are the complete bankruptcy records.

Mr. Margolis: I found these were voluminous and the records, as Your Honor knows, were turned over to Mr. Meilink, representative of the Board of Trade. I might add, Your Honor, Mr. Meilink is ill and under the care of a physician. We have the books necessary. I will bring a certificate out in that regard.

Mr. Berger: Your Honor, he was testifying from memory as to what the financial statement showed. I objected and I wanted the books.

The Court: You know, he says that he signed this petition on information obtained from his book records.

Mr. Berger: Yes.

The Court: Doesn't have to be the bookkeeper himself.

Mr. Berger: That is true, but I think the books are the best evidence, particularly if it is based upon a so-called financial statement which seems to be the crux of the case which was presented in October and September to Mr. Kolb and Mr. Norberg. Now, I asked him if he has those financial statements.

The Court: And he says they are not——

Q. (By Mr. Berger): Where are they?

A. The financial statement was as of July 31, 1949.

(Testimony of Paul Loudolph.)

Q. Where is that financial statement? [28]

A. Mr.—All the records of the corporation was turned over to Mr. Meilink.

Q. Did you turn the office copy of that statement over to him?

A. Yes, sir, he has typed copies, I believe, from the work papers from the C.P.A.

Q. Did you make up a financial statement in October?

A. The last financial statement we made was—by the C.P.A. was as of July 31, 1949.

Q. Is that the same financial statement that was shown to Mr. Norberg in September and Mr. Kolb in October? A. Yes, sir.

Q. Same one, there was no other financial statement made after July, is that correct?

A. That is correct.

Q. Now, you say you had a number of accounts receivable for equipment, notes receivable, and so forth, and you had a number of franchise stores, about 13 of them, you stated?

A. That is correct.

Q. Were they all franchise stores or just some of them?

A. Well, originally we had sold the 13 as franchise stores. Subsequently to that we had to take three or four of them back.

Q. Now, as of September how many did you have? A. Operating stores, 13. [29]

Q. Franchise stores in September?

(Testimony of Paul Loudolph.)

A. I don't understand the difference between operating stores and franchise stores.

Q. You are the one that made the statement; you said you had 13 franchise stores, is that how many you had in September or did you have more or less in September of franchise stores?

A. We were operating two, so we had eleven franchise and operating two which we—our franchise didn't release the people from the obligation, just kind of picked up and we operated the store for them.

Q. So you had eleven franchise stores in September, not 13, is that correct? A. Yes.

Q. I see. All right, now, you had two operating stores that were formerly franchise stores. What do you mean by franchise stores, Mr. Loudolph?

A. The party who run the store had purchased it.

Q. Purchased it from whom?

A. Well, we built the stores and put in all of the equipment and all the things necessary to open it and we sold it at cost to the purchaser with the franchise to buy our products.

Q. Did they pay you for that store?

A. They paid us some down payments in cash, and in some cases we took a note for the balance.

Q. Secured by a chattel mortgage? [30]

A. No.

Q. You just made an outright sale, took an open note for the balance?

(Testimony of Paul Loudolph.)

A. Yes, sir, because most of the store owners had financing of their own under the Morris Plan and the Bank of America.

Q. So you guaranteed those notes to the Morris Plan, is that correct? A. That is correct.

Q. So therefore the mortgages were on the equipment and you guaranteed that mortgage, is that correct? A. Yes, sir.

Q. And the stores then—how much money did you receive for the various stores, do you know offhand?

A. Well, about four of them were—paid cash. The cash price varied from \$7200 to \$7950.

Q. They paid all cash?

A. Some did, one, two or three paid all cash; some paid \$3000 down, various amounts.

Q. You had some equity in most of those stores, did you not, Mr. Loudolph?

A. We had notes on the balance due on about four of them; four or five.

Q. Now, the list of unsecured creditors that you had, that you talked about, was that the same list that was unsecured in October, in September of 1949, or November, which? Do you know [31] off-hand, or without referring to your books?

A. The list was primarily, it was the same with the exception of an accounting bill that was to come in, and an attorney bill that was to come in and some additions in labor. Aside from that it was the same.

Q. Yes. When did you go on a C.O.D. basis, Mr.

(Testimony of Paul Loudolph.)

Loudolph, with the various creditors that you had?

A. Sometime in August.

Q. In August. Up to that time——

A. We put our stores on a C.O.D. basis and then we paid on a C.O.D. basis. We didn't give the store any more credit.

Q. When were you on a C.O.D. basis with some of your creditors? A. Yes, sir.

Q. When was that? A. In August.

Q. You did that voluntarily?

A. No, began to get behind.

Q. Yes.

A. Only way we could get our materials.

Q. Now, you stated that your liabilities were the same, approximately the same in September as in November? A. Yes, sir.

Q. And that with the exception that you didn't pay for the salaries in November?

A. Yes, and the exception that we had, that accounting bill [32] still due and the attorney work.

Q. And didn't you——

A. Some smaller ones.

Q. Didn't you withdraw from your cash fund the same amount of money, at least don't your books show that you withdrew from your account fund the amount of the salaries you should have been paying to the employees?

A. Stopped salaries in July, took no salaries, the offices took no salaries after July.

Q. The salaries you referred to were the officer's salaries? A. No.

(Testimony of Paul Loudolph.)

Q. What were the salaries you were referring to?

A. I am referring to the driver and the girl in the office.

Q. Was the driver a member of the corporation?

A. No, sir.

Q. Was the girl in the office? A. No, sir.

Q. Did they get paid since July?

A. Small amounts, but there is still a balance owing to them.

Q. And you did not deduct that, the amount of monies due them, those two only, from your cash fund?

A. No, we paid them as we could, gave them sometimes, gave them \$50 on account of their salary, paid as we could and when we had to close we owed them approximately \$400 each. [33]

Q. Coming back to the conversation that you first had with Mr. Norberg when he called upon you in September, you showed him the financial statement at that time, did you? A. Yes, sir.

Q. You are positive of that?

A. I am, I had it right there.

Q. And did you go over it thoroughly with him?

A. Yes, sir.

Q. Did you tell him at all that you were expecting new capital to come in? A. Yes, sir.

Q. And did you tell him where you were going to get new capital?

A. I don't know. We were working with a man named Pate.

(Testimony of Paul Loudolph.)

Q. He was a man who used to call on you and he was anxious to come in with you?

A. The main reason I brought up that with Mr. Norberg, I told him he would make our chances very slight if an action was put on at this time.

Q. Slight for what?

A. To get additional capital that would put us on our feet.

Q. Did you mention anything at all about getting a loan from R.F.C.?

A. Yes, sir, we were working with our R.F.C.—probably came out in the conversation. [34]

Q. Probably did—what happened?

A. We didn't get it.

Q. Did you make application for it?

A. Yes, an application in the sense that I had about four conferences—they don't take applications in the R.F.C. unless it is going to go through, but they talk with you. I had the Pacific National Bank introduce me, but I had quite a few conferences with the R.F.C. but they didn't think that it was worth while to put in an application.

Q. In other words, your business was too small for them to invest in?

A. I don't think it was a matter of size, it was just that the statement didn't look good enough.

Q. Is that the same financial statement you are talking about? A. Yes, sir.

Q. The same one you showed to them?

A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. Now you said you afterwards went in to see Mr. Kolb; is that the man's name? A. Yes.

Q. At his office? A. Yes, sir.

Q. The same week that the attachment was levied?

A. It was shortly after, I would say.

Q. And did you show Mr. Kolb the same financial statement? [35] A. Yes, sir.

Q. Did you leave a copy of it with him?

A. I may have.

Q. You may have, and at that time did you discuss your financial standing with Mr. Kolb when Mr. Norberg was present? A. Yes, sir.

Q. And do you remember what Mr. Kolb told you?

A. Yes, we went over the statement and the facts of the case and I explained that about the accounts receivable and their interest, the two gentlemen's interest were collecting for their own clients.

Q. I didn't ask you about interests, I asked you what he said. Do you remember what he said?

A. I told—Mr. Kolb said we didn't appear to be bankrupt on our statement.

Q. And what did you tell him at that time?

A. Then I went into the details of the uncollectable items and how much he would get for the plant and equipment if it was closed.

Q. And did you tell him that you thought that you were bankrupt according to your statement?

(Testimony of Paul Loudolph.)

A. I told him that we were insolvent, we couldn't pay our bills.

Q. And he told you it was his opinion that you were not insolvent? A. Yes, sir.

Q. And isn't it a fact that you yourself told him you were [36] solvent; isn't that correct?

A. No, sir.

Q. You are positive of that?

A. Yes, I am.

Q. Now, you made some statement awhile ago, Mr. Loudolph, about a preference. What do you mean by a preference? Do you know what a preference means?

A. The only thing I know what a preference means, pays one client against the others. I told him that we had no money and that we couldn't pay Mr. Norberg, it wouldn't be fair to the other creditors not to pay them equally.

Q. And did you tell him that that would make it a preference, you had no thought of going into bankruptcy at that time, did you, Mr.—

A. Yes, we had thought of it.

Q. Well, but you never filed a petition on your own account, did you?

A. No, sir, but I was advised by my attorney to do it.

Q. And your idea of a preference was that you would pay one and not the other, is that what you mean? A. That is right.

Q. Did you pay any other bills besides that of Norberg's and not all the bills?

(Testimony of Paul Loudolph.)

A. No, sir, only on a C.O.D. that we were able to operate. The telephone bill may be excepted. [37]

Q. And was there any conversation between you at that time and with Mr. Kolb that according to the statement he told you that he would get about 75 cents on the dollar? Was there any discussion with that?

A. Yes, he said that—they were giving me a rather rough time, and they said, well, this statement shows, gets 75 cents on the dollar, and then I went over it with them again and told them there wouldn't be any, if fact, there wouldn't be enough assets to cover the liabilities.

Q. And coming back to the statement of your presenting and preparing and showing to the R.F.C., that is, a statement that you had hoped would be used by the R.F.C.—withdraw that. Is that the statement you intended the R.F.C. to use to get your further financing?

A. Yes, sir. As I remember it was the same financial statement.

Q. And that showed you then were in a bankrupt position, did it?

A. As—if we could get more money, as were seeking from the R.F.C., probably been able to continue.

Q. I asked you whether or not that statement showed you were in a bankrupt position. Did it or did it not show that?

A. Will you explain to me what you mean by a bankrupt condition?

(Testimony of Paul Loudolph.)

Q. You yourself made the statement, according to your statement you were insolvent. That is what I want to know, [38] what you mean?

A. We had no money, we had—we couldn't collect in our accounts receivable showed as assets, we could collect on our notes showed as assets maybe a small amount of cash, two or three or four hundred dollars, and we had no way of paying our bills.

Q. Well, is that the financial statement that you showed to the R.F.C. with the purpose and intent that they should lend you money on your business, is that correct?

A. That is right, if they loaned the money the situation would have changed.

Q. Do you have any copies of that financial statement of July, 1949?

A. I haven't personally, but they are available. I turned them over to Mr. Meilink.

Q. Now, Mr. Loudolph, you said that you had franchise contracts with various stores, eleven of them, that they bought the merchandise and equipment, whatever it was, gave you cash and a note for the balance, and under that franchise permitted them to use your product. Now, what else was there with reference to that franchise as far as assets is concerned. Do you know?

A. Unless you would consider the good will of the name, which didn't work out, didn't become any good will.

Q. Did anyone ever test, to your knowledge, the

(Testimony of Paul Loudolph.)

legality as [39] to whether or not those franchises were or were not good?

Mr. Margolis: We object to the question, may it please your Honor, on the ground it is incompetent and irrelevant and immaterial.

The Court: I don't quite see that it is relevant, but I will allow it.

Mr. Berger: Only a preliminary question, your Honor.

The Court: If it is preliminary.

Mr. Berger: Thank you, your Honor.

The Witness: Could I have the question again, please?

Q. (By Mr. Berger): Did anyone ever test, to your knowledge, the legality of those franchise contracts?

A. No, they didn't, not to my knowledge. There was some threats made to do it, but to my knowledge I have never been served with any papers to test that.

Q. You have not. All right. I call your attention, Mr. Loudolph, of a judgment recovered against you in the Superior Court of California in and for the County of San Mateo, being No. 50219—

Mr. Margolis: May I interrupt before counsel reads something into the record? I think in the ordinary course of a trial there should be afforded—

Mr. Berger: I am reading, if your Honor please, from a list or statement put out in the corporation,

(Testimony of Paul Loudolph.)

read before the Court, filed by Judge Wyman, reading from their own records.

The Court: Filed with the records in this case?

Mr. Berger: Part of the bankruptcy records.

Mr. Margolis: Part of the record, may it please your Honor, so the Court will not be confused with the proceedings now pending before Judge Wyman in bankruptcy. I am familiar with the document. As a matter of fact, I prepared the information from which this notice was sent to all creditors.

Mr. Berger: I am reading now, if your Honor please——

Mr. Margolis: Going to object to any reading of the contents of the document, your Honor, unless the proper foundation is laid.

The Court: How is it material?

Mr. Berger: To show, your Honor, there were two judgments recovered against Mr. Loudolph.

The Court: Against him personally or the corporation?

Mr. Berger: The corporation. With reference to this franchise to test as to whether or not the franchises were proper and legal, which is for the purpose of setting forth, the purpose for this is one of our defenses—it isn't in any way anticipating a defense, except we must put this in to show, if the Court please, that the franchises, in and of themselves were practically of no value, and if that is the case it may be that the men who actually paid the money, whom they collected the money from, may have a claim against us for the refund of the money, because they weren't entitled

(Testimony of Paul Loudolph.)

to the bankruptcy, may not have been entitled to it. [41]

The Court: Well, he wouldn't have a claim directly against you.

Mr. Berger: No—yes, he could, because you might say in the nature of a gratuitous payee, or payment under mistake and he could be and once they collected under the execution and attachment against the corporation, and if he didn't owe the corporation any money, obviously he shouldn't pay it, and that is the purpose of the preliminary questions I am going into now, your Honor.

Mr. Margolis: May I be heard, your Honor, unless your Honor desires a question.

The Court: No.

Mr. Margolis: Object to any examination in connection with this document in that we don't wish to know all that went on before, but we object to it on the ground it is incompetent, irrelevant and immaterial. The fact that the parties who paid over any monies to sheriff pursuant to the attachment and execution may have a claim against the bankrupt corporation is not an issue here. Certainly that creditor who paid the sheriff can in no wise go after the creditor in this action, that is the Norberg—

The Court: No, if we assumed that that person shouldn't have paid it over—

Mr. Berger: May not have even owed it to the bankrupts.

The Court: Then it goes in the hands of the trustees in [42] bankruptcy here and whoever is

(Testimony of Paul Loudolph.)

entitled to it, he or anyone else, can come and get it, but the point is this: If they are not entitled to it it ought to go back to the trustee and officers of the Court subject to the——

Mr. Berger: Furthermore, if the Court please, this is a direct contradiction to the questions, the previous question when I asked him whether there were any other claims or any other adjudications, and he said no suits filed against him, no judgments.

The Court: Well, you may ask that on a question of credibility.

Mr. Berger: Thank you, your Honor. If the Court please, at this time—do you have another copy of it?

Mr. Margolis: One will be available.

Mr. Berger: I would like to introduce it in evidence.

Mr. Margolis: I have no objection to it going into evidence, quite the contrary. This is a notice?

Mr. Berger: Yes.

Mr. Margolis: It seems to me that the original petition and the order should also be introduced into evidence so that the Court will know what was in back of it. The notice is prepared, as the Court well knows, from the prayer of the petition.

The Court: Certainly.

Mr. Margolis: There were four settlements made with some [43] of the so-called accounts receivable and debtors who had executed notes in favor of the corporation, which notes were placed with the Pacific National Bank and I think if the notice is

(Testimony of Paul Loudolph.)

going to be introduced, I think we should have sent over by the Clerk of Judge Wyman's court the original petition.

Mr. Berger: I will stipulate it may go in.

The Court: Let the whole thing go in.

Mr. Berger: Yes, your Honor.

The Court: Can be furnished later.

Mr. Berger: Thank you, your Honor.

Q. (By Mr. Berger): Mr. Loudolph, calling your attention to this notice of the bankruptcy court dated May 31, 1950, setting forth a judgment was recovered against the corporation in Superior Court of San Mateo County for the sum of \$1523.32, and \$11 cost; do you remember that?

The Court: When is the date, sir?

Mr. Berger: It doesn't say here, that is what I wanted to ask him, when and where it occurred, just reading from this notice.

Mr. Margolis: That is the reason I suggested in order the Court have all the facts, to produce and offer in evidence——

The Court: You can ask this witness if a judgment was obtained against his corporation.

Mr. Berger: That is what I wanted to know, if he knew whether—— [44]

Mr. Margolis: If he knows.

Q. (By Mr. Berger): Do you remember that judgment, Mr. Loudolph?

The Court: What judgment is that?

Mr. Berger: The judgment in favor of Bernsten and Bernsten, Andrew and Loretta, plaintiffs.

(Testimony of Paul Loudolph.)

A. That happened—I lost control of the corporation.

The Court: I think it would be material to show knowledge if a judgment was obtained, had common knowledge, these people would know.

Mr. Berger: Credibility, your Honor.

Mr. Margolis: If he knew an officer could have been served, your Honor. There is no foundation.

The Court: Not talking about his knowledge, I am talking about the judgment is of common knowledge.

Mr. Berger: It is a matter of record.

The Court: I think it is rather helpful to your case.

Mr. Margolis: We have no objection, unless that is the reason——

The Court: You have no objection—I will let him ask the question.

Mr. Berger: Very well.

Q. Do you remember that judgment, Mr. Loudolph? A. No, sir, I do not.

Q. You did not remember that at all?

A. I know Bernsten and know the men and people in the cases. [45]

Q. And you had an accounts receivable in the amount of \$1271, is that correct?

A. I would say close to that.

Q. Close to that, but you don't have any recollection of that judgment at all?

A. What is the date, may be——

Q. I don't know.

(Testimony of Paul Loudolph.)

A. Out of control—I don't think when I was in control I didn't have that. I am sure we didn't.

Q. Do you know of another judgment against you, Mr. Loudolph, in favor of Raymond S. Hayden?

Mr. Margolis: So the record will be straight who does that notice, Mr. Berger, recite a judgment against?

Mr. Berger: I said the Brick O'Gold, I didn't say Mr. Loudolph.

The Court: The corporation?

Mr. Berger: Yes.

Q. Do you know another judgment against the Brick O'Gold, Mr. Loudolph, in favor of Raymond S. Hayden and Lyle V. Hayden, for the sum of \$1449 in the San Mateo County Superior Court?

A. No, sir.

Q. Action 50221? A. No, sir.

Q. You don't remember that at all?

A. Those must have been actions after the trustee took charge. [46]

Q. Do you know those people?

A. Yes, sir.

Q. Do they have franchises? A. Yes, sir.

Q. And do you know whether or not they sued on those franchises?

A. I had a discussion with their attorney at one time.

Q. When?

A. Oh, just very close to the time when we—probably in September or October.

(Testimony of Paul Loudolph.)

Q. Before or after the Norberg transaction?

A. After.

Q. How long after?

A. I would judge three weeks.

Q. And what was the discussion about?

A. They wanted us to release them from their franchise, the contract, and we had a chat with their attorney, two of them came up and we didn't think we should, or we didn't have the power to do it.

Q. And then you don't know whether they filed suit on that?

A. Must have been later, didn't file on me to the best of my knowledge.

Q. How about the Bernsten case?

A. Bernsten and Hayden worked together on that.

Q. Same thing? [47] A. Yes.

Q. Now, one more question and I may have to repeat myself, your Honor, with your Honor's permission, I asked awhile ago, Mr. Loudolph, with reference to the amount of monies due or paid by you to the corporation for the stock. Did your financial statement show that? A. Yes, sir.

Q. And did your financial statement show whether or not you owe any more money as an individual to the corporation?

A. The financial statement showed I did owe, oh, seven or eight hundred dollars.

Q. Seven or eight hundred dollars, and did you pay it? A. No, sir.

Q. You still owe that to the corporation?

(Testimony of Paul Loudolph.)

A. Yes, sir.

Q. Was that listed as part of the assets in the list, in the claim? A. I don't know, sir.

Q. Would you mind looking for it?

A. Says here \$554.06 I owe.

Q. Did you pay it? A. No, sir.

Q. \$554.06.

A. That amount that shows on the books.

Q. Is that all that you owe? [48] A. Yes.

Q. And what is that for, for the stock or other obligations? A. It wasn't for the stock.

Q. Was it for a withdrawal that you overdrew?

A. No, sir, no, sir, a payment to the Pacific National Bank so that my \$15,000 would be free and clear to put into the corporation.

Q. I asked you about stock, not about other obligations. I asked you whether or not there was some more money due by you for the stock, and you said yes, seven or eight hundred dollars. Now, is that listed in there? A. Yes, it is listed.

Q. Will you show in here—\$554, is that for the stock? A. That was the withdrawal.

Q. I want to know is the stock, the balance due by you for the stock? A. Nothing.

Q. Now, awhile ago, Mr. Loudolph—I may be wrong, will you please correct me—awhile ago I asked you whether or not there was any more money due by you for the stock and if the financial statement showed there was more money due by you as an individual to the corporation for the

(Testimony of Paul Loudolph.)

stock to be issued and you said yes, there was. Now, please show me that.

The Court: I think I understand it. You bought a certain amount of stuff? [49]

The Witness: Yes, sir.

The Court: You didn't have quite enough money to pay for it and you got the money from the Bank and the corporation had to furnish some five or six hundred dollars, is that correct?

The Witness: Actually what happened was that I sold my trucking business and the owners of Marin Dell, Bordens & Samarkand, and they gave me notes for \$5000 each, payable about a year hence. I had another little obligation with the Pacific National Bank, about \$556 in this figure. The bank then took the notes from these three gentlemen and in order—before I went down to talk to them about getting the \$15,000 with these notes as security, I had the corporation pay off the old indebtedness and they gave me the \$15,000 and I put it in to the corporation along with the automobile.

Q. Yes. Any other cash—I asked any other cash due, any more cash due by you besides that \$15,000, according to your financial statement?

A. No, cash and automobile I put in and then the corporation subsequently paid off the balance I owed on the automobile, made that \$800 more than the \$15,000.

Q. Then you overpaid about \$800 to the corporation, did you?

(Testimony of Paul Loudolph.)

A. No, sir, it is the amount of money that I put in, \$15,700, something like that.

Mr. Berger: That is all, your Honor.

Mr. Margolis: I might be of some assistance to counsel, [50] your Honor, if he will stipulate with respect to these petitions and the orders. I find a stamped copy of each of the petitions described in the notice that has been offered here.

The Court: You mean the judgments?

Mr. Margolis: No, before the referee in bankruptcy with respect to that notice, counsel was reading from, these petitions to compromise, and I also find certified copies of each of the orders in each instance signed by the referee. Now, I will exhibit them to counsel here. I have no objection, they may become a part of this record and introduced if counsel doesn't desire, I will introduce them so the court will know the entire situation with respect to the settlement of these four matters, only three of which, I believe, counsel referred to.

Mr. Berger: This doesn't state the date of the judgment, your Honor. That is what I wanted to find out, the one I am looking over, hurriedly.

The Court: Well, what is the purport? Isn't it to show that the corporation was in worse condition?

Mr. Berger: No, the purport is, your Honor, the purpose of my first bringing up that point was to show, as I explained before, it may be possible that the corporation never was even entitled to that money. Second, to discredit this witness with refer-

(Testimony of Paul Loudolph.)

ence to going to his credibility, with reference to the judgment, your Honor.

Mr. Margolis: Now, I notice, if I may answer counsel, your [51] Honor, in two instances here, one referring to the matter described in the notice with regard to the petition of compromise it made with the Haydens this language: "That on or about January 13, 1950, said purchasers, as plaintiffs, recovered judgment against bankrupt, as defendant," meaning Brick O'Gold.

The Court: That is after the bankruptcy.

Mr. Margolis: That is correct and if your Honor will take my statement, I sat in on all of the conferences and in order not to—when we had sufficient time to make application to vacate and set aside the judgment within the six month period, one of the considerations for our not doing so is recited here and in the statement made to the referee in open Court, against which we took certain small sums in settlement, because that is all we could get.

Mr. Berger: The purpose, as I said before—

Mr. Margolis: Also in the Andrew Bernsten and Loretta Bernsten the date of the judgment is there referred to in the petition, the petition which I prepared.

Mr. Berger: What is the date?

Mr. Margolis: On or about January 13, similarly, 1950, judgment, after bankruptcy, going in and vacating and setting aside, not to burden the estate with that expense, and upon investigation—

The Court: I don't think a judgment obtained after bankruptcy would have any materiality. [52]

(Testimony of Paul Loudolph.)

Mr. Berger: I don't know when the actions were filed.

The Court: He says he does not know anything about it.

Mr. Berger: I wanted to disprove——

The Court: If they were filed and he was served before that time it will affect his credibility.

Mr. Berger: Will have to check with the clerk's office in San Mateo County.

The Court: If you introduce details later on that, I will hear it.

Mr. Berger: All right, I will look for that.

Mr. Margolis: And to complete it with respect to the Stephens matter the judgment was entered on November 14, 1949, and I sat in on conferences in connection with the matter and a very fine settlement was made, I think, to everyone concerned. We offer these as our exhibits.

Mr. Berger: I have no objection, Your Honor, with the exception I would like, if I need time, to ascertain the dates of the filing of the actions.

The Court: I will allow them if you gentlemen want them.

Mr. Berger: I only brought it out for one purpose, and it mainly was for credibility, and——

Mr. Margolis: It is immaterial and we will object to cluttering of the record on that ground, Your Honor. It is immaterial.

The Court: Mark them for identification. If there is other [53] testimony, I will admit them.

The Clerk: Exhibits 1, 2, 3 and 4 introduced for identification.

(Testimony of Paul Loudolph.)

(Whereupon the documents entitled "Trustee's Petition for Order authorizing compromise of controversy, and giving notice thereof to creditors" in the case of Kenneth Johnson; John H. Stephens and Mildred Stephens, his wife; Andrew Bernsten and Loretta M. Bernsten, his wife; and Raymond S. Hayden and Lyle V. Hayden, were marked respectively plaintiff's exhibits 1, 2, 3 and 4 for identification.)

Mr. Berger: That is all for this witness.

Redirect Examination

By Mr. Margolis:

Q. You mentioned something to Mr. Berger about the corporation going on a cash basis about August of 1949? A. Yes, sir.

Q. In your discussions with Mr. Norberg did you advise him of that fact?

A. Yes, sir, we were on a cash basis.

Q. And where did you advise him of that, in the Lakeside Store? A. In a conference there.

Q. In a conference there. Was the same matters discussed in a conference had in the other attorney's office, do you recall? A. Yes, sir.

Mr. Margolis: I have no further questions. [54]

Mr. Berger: No further questions.

The Court: That is all, you may step down.

(Witness excused.)

Mr. Margolis: Call Miss Lee, Your Honor, as our next witness.

Mr. Berger: May I interrupt, counsel? I subpoenaed this Mr. Kolb. He has to go back immediately. With Your Honor's permission I would like to put him on, if counsel doesn't object.

The Court: Have you any objection?

Mr. Margolis: I have none.

The Court: Let Mr. Kolb go on.

THEODORE A. KOLB

called as witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the court, please?

A. Theodore A. Kolb.

Direct Examination

Mr. Berger: And what is your profession?

A. Attorney at law.

Q. In San Francisco?

A. In San Francisco.

Q. And do you know Mr. Norberg, do you?

A. I do. [55]

Q. And do you know Mr. Loudolph, who was just on the witness stand?

A. I do.

Q. You have met him?

A. Yes, I have.

Q. When was the first time you ever talked to him or met him, Mr. Kolb?

A. Around July, 1949.

Q. And where was that?

(Testimony of Theodore A. Kolb.)

A. We had several contacts by mail. I might preface that our office represented Pacific Electrical and Mechanical Co., Inc., who were a creditor of Brick O'Gold corporation for certain mechanical and electrical work done and the installation and construction of stores. There was a considerable amount owing, and our clients asked us to get in touch with Brick O'Gold corporation to find out what can be done in the matter. On May 31——

Q. What year?

A. 1949, they received a letter from Mr. Loudolph as President of the Brick O'Gold corporation.

Q. Do you have that letter here?

A. I have this letter on——

Mr. Margolis: May I see that, please?

Mr. Berger: Counsel, will you stipulate that is the signature of Mr. Loudolph of the Brick [56] O'Gold?

Mr. Margolis: If you will allow me to compare.

Mr. Berger: Well, ask him, he is right there.

Mr. Margolis: The President acknowledges that that is his signature, Your Honor.

Mr. Berger: I will introduce that, if Your Honor please, as defendant's exhibit 1, and then you may read it.

The Clerk: Defendant's Exhibit A.

Mr. Berger: A, rather; always used to the plaintiffs.

Mr. Margolis: Object to that going in evidence,

(Testimony of Theodore A. Kolb.)

no proper foundation has been laid, Your Honor, for the introduction of the letter in evidence.

Mr. Berger: Already been admitted, your Honor.

The Court: Well, it is a letter from the President of the corporation?

Mr. Margolis: That is right.

Mr. Berger: That is right.

The Court: It may be—until I see it, I can't tell whether it is material. It may be simply a Christmas greeting for all I know.

Mr. Berger: Or passing the time of day.

Mr. Margolis: Not in connection with the affairs of the business, Your Honor.

The Court: Well, just the president of the corporation beginning to get into trouble.

Mr. Margolis: Very well. [57]

Mr. Berger: When did you get that letter, Mr. Kolb?

A. It was transmitted to our office by our clients on June 1st, 1949, in a letter wherein they took the position they would be willing to take a note if the same were secured. I contacted Mr. Loudolph by letter, the Brick O'Gold corporation to Mr. Loudolph's attention, and suggested that the notes be secured. I didn't receive a reply to that letter so I sent a follow-up letter to Mr. Loudolph on June 27, 1949, enclosing a copy of our trial letter which we received a reply by Mr. Loudolph on July 2, wherein he stated—

Mr. Margolis: Just a moment.

(Testimony of Theodore A. Kolb.)

Mr. Berger: Just a moment, may I see that letter?

Mr. Margolis: I would like to see the correspondence that counsel has referred to, this is in reply to.

Mr. Berger: Fine, let them all go in together.

Mr. Margolis: Could I have them back after the case is decided?

Mr. Berger: May we, with the Court's permission, after the decision?

The Court: After a decision, if there is no objection by counsel, I will release the exhibits.

Mr. Berger: Thank you. I don't think there will be anything pertaining to your particular issue.

The Court: Off the record.

(Off the record discussion.) [58]

Mr. Margolis: May I inquire what we are going to do with the documents that counsel now exhibited to me?

Mr. Berger: I want to introduce those also in evidence.

Mr. Margolis: You mean all of them?

Mr. Berger: That is correct.

Mr. Margolis: The carbon copies dated July 27, 1949, and June 22, 1949, addressed to Brick O'Gold Corporation, sent by the witness to the corporation, as well as the original letter of July 2, 1949, on the stationery of Brick O'Gold.

Mr. Berger: Introduced as one exhibit, Your Honor.

The Court: Very well.

(Testimony of Theodore A. Kolb.)

Mr. Berger: So stamped Exhibit B.

The Court: Defendant's exhibit B introduced and filed in evidence.

(The documents above referred to were thereupon marked Defendant's exhibit B in evidence.)

Mr. Berger: Your Honor would like to see these first?

Q. Now, Mr. Kolb, you stated that you received an answer back from Mr. Loudolf of the Brick O'Gold, as president of Brick O'Gold, on June 17, 1949?

A. In this answer Mr. Loudolf in sum and substance stated that he was in a bind for cash at the time, but that—using this paraphrasing here, the bright side of the picture is that in spite of the poor spring and summer weather experienced so far, our business is showing large gains each month and the [59] future looks very bright. That was on July 2.

Q. Did you have any more correspondence with him at that time?

A. Whereupon I took the matter up with our clients.

Mr. Margolis: May I interrupt at this moment, Your Honor? I think it is only fair that the contents of the letter of July 2, if it is going to be read into the record, in order to know what they are, should be prefaced by reading the entire letter.

(Testimony of Theodore A. Kolb.)

The Court: I thought the letters were introduced.

Mr. Margolis: I object to just reading a mere paragraph.

The Court: I have read them.

Mr. Margolis: I didn't know whether these were presented.

Mr. Berger: As far as I am concerned you can read the entire contents of all the copies.

Q. Go ahead, Mr. Kolb.

A. Well, after that we took the matter up and, in a conference with our clients, and they made an independent check on the credit of Mr. Loudolf personally and they felt that before they entered into an unsecured promissory note they wanted the signature of the other two officers on the promissory note, to wit, Dr. Etta Lee and Miss Nellie Lee, and we communicated that in a letter of July 12, 1949, to the Brick O'Gold Corporation, to the attention of Mr. Loudolph.

Q. And then what happened?

A. We didn't hear from Mr. Loudolf in response to that letter. [60] We stated in the letter that unless we heard from them, to make some sort of an arrangement between that date and the 18th of July we were instructed by our clients to begin litigation against Brick O'Gold Corporation.

Mr. Margolis: Pardon the interruption; was that introduced, or is it another letter you are reading from now? A. That is correct, July 12.

(Testimony of Theodore A. Kolb.)

Mr. Margolis: It seems to me, Your Honor, that this should be introduced.

Mr. Berger: I will introduce that, if Your Honor please.

The Court: All right.

Q. (By Mr. Berger): Go ahead, Mr. Kolb.

A. I didn't hear from Mr. Loudolf by the 18th and I waited another week and then filed suit against the Brick O'Gold Corporation on behalf of the Pacific Electrical and Mechanical [61] Company.

Q. When was that?

A. I just checked the complaint; it is July 25.

Q. Of 1949? A. 1949.

The Court: Defense exhibit C admitted and filed in evidence.

(Whereupon the document referred to was received in evidence as Defendant's Exhibit C.)

Q. Was he served; do you have records on that?

A. Verified on July 25 and filed on August 2, 1949.

Q. Do you know when Mr. Loudolf was served; have you any record of service on him?

A. I haven't got the record with me. To the best of my recollection Mr. Loudolf wasn't served, Dr. Lee.

Q. A member of the corporation?

A. An officer of the corporation.

(Testimony of Theodore A. Kolb.)

Q. Do you know about when she was served, roughly?

A. I would say within the next few days, a few days after filing of the complaint.

Q. In July some time? A. In August.

Q. In August.

The Court: Early August?

The Witness: Early, about the first week in August.

Q. O.K., go ahead. [62]

A. Right after she was served Mr. Loudolf contacted me.

Q. Did he discuss anything about the suit?

A. He came to my office with a financial statement.

Q. Did he mention anything at all about this suit? A. Oh, yes, he was familiar——

Q. What did he say?

A. He stated he realized we had filed a suit and he is in a bind right presently, that he is perfectly solvent and just one of these bad conditions where there was a bad—cold summer, and they didn't have the anticipated sales that they had hoped for, and he asked whether we could work something, work it out in some sort of fashion that we could extend him some time and hold off the proceedings with the suit until they could get over their temporary bind, according to him at that time was strictly seasonal. I said I don't have—I would have, if I remember correctly now, in substance I told him that I would have to see something more than just his statement

(Testimony of Theodore A. Kolb.)

to represent to my clients that would assist me in that way, their credit committee before I could suggest to them to hold off and he came back and I observed he had a financial statement, he said he had a financial statement. I said, well, I would like to see it, and he left my office that day and came back in the afternoon, said he went to his accountants and he came back with a mimeographed financial statement consisting of several pages. [63]

Q. Do you remember the date of that, Mr. Kolb?

A. I wouldn't like to swear to it, Mr. Berger. It was some time, either July—June or July.

Q. That is all right. That is close enough.

A. It was within a few days, relative a few months, I asked him whether the situation has changed since the time of the financial statement and he definitely, he assured me it had not, still the same condition; it is simply a seasonal situation like any other business, occasionally gets themselves in a bind for cash, but they are absolutely liquid because their assets far exceed their liabilities and that the condition as he set forth in the letter of July 2—I think it is July 2—the last letter he wrote, still the same, but just the fact due to the cold summer at that time and they are selling ice cream. I said I wanted to take the matter up with our clients, whatever their credit committee decided was satisfactory with us to do whatever they wanted us to. I passed the information on to them and they had it under advisement, and just about that time Mr. Norberg contacted us.

(Testimony of Theodore A. Kolb.)

Q. Now, before that, coming back to the first meeting you had in your office, who was present at that time? A. Just Mr. Loudolf.

Q. And you?

A. That is right, in my office.

Q. Did he give you a financial statement at that time? [64]

Mr. Margolis: Just a moment, may I have the date? Or approximate date?

A. The first week in August, Mr. Margolis.

Mr. Margolis: I see.

Q. (By Mr. Berger): And did——

A. Might be the second.

Mr. Margolis: Excuse me, get my mind straight on this.

The Court: After the suit had been——

The Witness: After suit was filed.

Mr. Margolis: The suit, you said, was filed in July?

The Witness: August 2, I checked on the complaint, verified July 25, filed August 2.

Mr. Margolis: Sorry for the interruption, Mr. Berger.

Q. (By Mr. Berger): At that time, when he came in the first time, did he have a financial statement with him?

A. Didn't have it with him. I told him I wanted to see a financial statement before, see, some form of authenticated statement and before I could talk to my clients and tell them that they ought to hold off in prosecuting the suit against the corporation.

(Testimony of Theodore A. Kolb.)

Q. Did he tell you as to his—did he go into at great length on the financial statement?

Mr. Margolis: That is objected to as leading. This is counsel's own witness.

Mr. Berger: Reframe the question. [65]

The Court: Reframe the question.

Q. (By Mr. Berger): Mr. Kolb, can you tell me whether or not any—can you tell me whether or not his financial statement was gone into at great length?

Mr. Margolis: Object on the same grounds heretofore urged, Your Honor; this witness is counsel's own.

The Court: Tell me whether you discussed his financial condition.

The Witness: I looked through the financial statement; I had several questions on it.

Q. Pardon me, before the financial statement—when he came in without the financial statement.

Q. He came in the morning without the financial statement and came back right, a couple of hours with it.

Q. Did he go into at any length as to his financial condition?

A. Well, he stated—it has been some time now.

Q. I appreciate it is hard to remember.

A. As I remember, he simply—we discussed with him and he said they were in a temporary bind due to that weather condition, that they were in good financial condition and that they were solvent, just a question they hadn't gotten any cash to meet their

(Testimony of Theodore A. Kolb.)

obligations and said there were certain deals pending, talked in generalities without actual figures, and I said, "Before going into this and before I can make any recommendations, pass any information on, I know the creditors, [66] the credit committee of the Pacific Electric and Mechanical Company would insist on some cold figures where they can see what is going on.

Q. Came back that afternoon?

A. Went out and came back that afternoon with a mimeographed sheet purportedly prepared by a certified public accountant.

Q. Did you go over that sheet at all with him?

A. I asked him several questions that came to mind as I went over it.

Q. Do you remember what they were?

A. I couldn't tell you. I know this much, that he had some, I think some \$40,000, or more than that, in accounts receivable. I wanted to know the breakdown on that and he said, "Well, the books are open at any time you want to see them. I don't know the detail of them." He said, a lot of stores owed them money and still working that out and slow payments, after they get going. He generally expressed to me the system how he operated, as I was totally unfamiliar with it.

The Court: Had you transmitted that information to your client?

The Witness: That is right.

The Court: As a result did your client withdraw the suit?

(Testimony of Theodore A. Kolb.)

The Witness: No, our clients said they felt they wanted a promissory note to secure the obligation before——

The Court: Wanted the note secured? [67]

The Witness: Wanted it signed by the—endorsed by the other two officers of the corporation.

The Court: In other words, your clients wanted something better than what they had.

The Witness: That is correct, before they would withdraw their suit.

Q. (By Mr. Berger): Did you ask Mr. Loudolf whether or not they were, he was in a bankrupt condition or whether he was insolvent?

A. I asked him that——

Mr. Margolis: Incompetent, irrelevant and immaterial, and leading and suggestive. This witness is the defendant's witness and both attorneys——

Mr. Berger: I asked him——

The Court: The water is over the dam, so to speak. Mr. Kolb described it——

Q. (By Mr. Berger): Will you please, as best you can, Mr. Kolb, relate what was said in regard to insolvency?

A. Well, I checked further into the statement of Mr. Loudolf and had made to him the request of our clients to get the note secured by the other two officers, and right about that time Miss Lee came in my office. She was an officer of the corporation.

Q. No, I asked you what you discussed?

A. Discussed the solvency of the [68] corporation.

(Testimony of Theodore A. Kolb.)

Q. What was said, that is what I wanted.

A. They both assured me at that stage, that was during August, that they were completely solvent. The only thing was that they couldn't get their collections in from their accounts as fast as they had anticipated due to this seasonal lag. Then the discussion came up they were going to get refinancing, going to get new blood so they can get some working capital. Apparently, they claimed that was their only trouble, that, plus the fact an accountant that they had sued them for \$5,000, which suit was completely unfounded and just tied them up in knots, tied up cash, he had attached some cash of theirs and that put them into quite a stress. I transmitted that information to the creditors committee, our creditors committee; our clients said they would insist on going ahead with the matter to judgment and they would hold off execution after judgment if satisfactory arrangements are made.

The Court: What do you mean by satisfactory arrangements?

The Witness: Payment of security.

The Court: Payment of security?

The Witness: Or his situation work itself out in such a way they could see their way clear of certainty of payment.

Q. Go ahead.

A. Especially keeping in mind it takes some time to obtain a judgment in the event that the discussions at that time would not culminate in satis-

(Testimony of Theodore A. Kolb.)

factory arrangements. So we [69] proceeded—as a matter of fact, I remember the attorney for Mr. Loudolf and Brick O'Gold Corporation stipulated to a judgment in the matter. He felt it was useless to enter an answer in the matter and a judgment was entered.

Mr. Margolis: I move what he felt be stricken, Your Honor.

The Court: Well, I will strike out what he felt. As a matter of fact, as a result of your conferences with your client you both allowed your account to ripen into a judgment?

The Witness: That is correct.

The Court: Not satisfied with the situation?

The Witness: Weren't satisfied, largely because Mr. Loudolf's slowness in answering communications and inability of getting a hold of him, and the fact he made appointments and didn't keep them quite frequently. Our clients felt they wanted to have something stronger than just Mr. Loudolf's word. He made promises and didn't keep them, however, whenever he did appear.

The Court: Isn't an unusual course, a debtor corporation trying to keep his head above water.

The Witness: It is the usual situation if you are short of cash.

The Court: You mean your clients weren't satisfied with the efforts and wanted either cash money, security, or a judgment, isn't that correct?

The Witness: That is correct. We weren't satisfied with [70] the efforts on the part of Mr. Loudolf,

(Testimony of Theodore A. Kolb.)

and our clients wanted Miss Lee in the picture and rather have her run the show than Mr. Loudolf, because from certain checks that they had made on the situation they weren't satisfied with Mr. Loudolf's management of the corporation, they wanted Miss Lee to take over and felt the only way to do that would be if Miss Lee was in active control of the business, not Mr. Loudolf.

Q. You mentioned that judgment was stipulated to?

A. That is correct, judgment stipulated to. When the attorney for Brick O'Gold assigned a stipulation and judgment entered upon the stipulation, he stated that he had no defense to the action and it was useless for him to enter an answer in the matter, so stipulated to judgment and judgment was entered.

Mr. Margolis: May I interrupt, please? Do you have the stipulation, sir, on the judgment? All of those matters become important, as I will demonstrate a little later, and like to get the chronology here, Your Honor.

The Witness: I haven't got a copy of the stipulation, it is in the file in Municipal Court.

Q. (By Mr. Margolis): Do you have a copy of the judgment, or do you have the date when judgment was entered? A. Judgment entered——

Q. (By Mr. Margolis): May I have that for the record, sir? A. September 21.

Q. You have a copy of the judgment there? [71]

A. I have a copy of the execution.

(Testimony of Theodore A. Kolb.)

Q. (By Mr. Margolis): May we have that, sir?

Mr. Margolis: Your Honor, forgive me for this interruption.

Mr. Berger: I think I can clarify this. I have a few more questions. It is twelve o'clock—a few more questions and I will be through. Counsel will want to cross-examine, no doubt.

The Court: Yes, I guess we will have to come back.

Mr. Margolis: I think that is my privilege, Your Honor.

The Court: Prefer stopping now rather than closing your examination? He has to come back anyway, might as well stop now.

Mr. Berger: Until what time, Your Honor?

The Court: Two is the usual time?

Mr. Berger: Yes, Your Honor.

Mr. Margolis: Yes. May the record disclose, Your Honor, I will keep this in my possession, or, rather, the clerk, keep the copy of the execution until we return at two o'clock?

The Court: Either one.

Mr. Margolis: Thank you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [72]

Afternoon Session, August 1, 1950, at 2:00 o'Clock

Mr. Berger: Mr. Margolis, I understand you found a copy of the statement?

Mr. Margolis: Yes. Does Your Honor wish me to give the figures? During the noon hour, I ran totals.

(Testimony of Theodore A. Kolb.)

The Court: Have you run the total of that?

Mr. Margolis: Yes, subject to any little error. I went over the claims, divided them into three parts, Your Honor, two tax claims totaling \$527.55, six wage claims totaling \$3,666.08, one of which, Your Honor, is in the total sum of \$2,100 and obviously under an appropriate bankruptcy section, after established, the claim is good only, preferred to \$600, and the balance \$1,500 good as a general claim, and all the other claims which are in that file, \$29,849.39, subject to someone correcting the estimate I might have made in running them off.

In going through my file I find a carbon copy of, a mimeographed copy of the financial statement to which reference was made this morning and Mr. Loudolf, the president of the corporation, during the noon hour also went down to the Board of Trade office, Your Honor, and has the original work sheets, which we shall also present.

Direct Examination
(Continued)

By Mr. Berger:

Q. Now, Mr. Kolb, prior to the noon hour [73] you made some reference to a financial statement. I show you a paper that was just handed me by counsel for the plaintiff and ask you is that the statement you had reference to?

A. Yes, that's the statement Mr. Loudolf handed me, consisting of four pages. It is mimeo-

(Testimony of Theodore A. Kolb.)

graphed, multigraphed, I would say, it was an exact copy, it looked, appears to be the same copy, one of those multigraph copies of the statement.

Q. Now, when was the first time you ever saw that statement?

A. The first time after Mr. Loudolf came in my office for the first time and he came back and brought this statement when I requested it.

Mr. Margolis: May we have that date, Your Honor?

Mr. Berger: Already testified he came that same morning, came back that same——

Mr. Margolis: I think the date is important.

The Court: Do you know the date?

Q. (By Mr. Berger): Roughly.

A. Well, it was, it was after we commenced suit on August 2.

The Court: I think you said the first week in August.

The Witness: The first week in August, right after Mrs. Lee, Dr. Lee, one of the officers of the corporation, was served, if I remember correctly.

Q. (By Mr. Berger): And did you have a discussion with him about that statement?

A. Yes, I went briefly over the statement. [74]

Q. Will you relate what was said, what you said and what he said?

A. Mr. Loudolf was complaining very bitterly about this \$5,000 suit and attachment where an accountant, who had worked for him, had attached

(Testimony of Theodore A. Kolb.)

all his assets, and he said that this voided him of any working capital.

And he said if he is being pressed by his creditors he wouldn't know what to do. He was very anxious to get this, the refinancing that he had a prospect at the time that would refinance it, that would come in with new capital into the business to give him some working capital. He said he had also pending an application with the RFC, too, in order to obtain additional financing, and I suggested to him—now thinking back—I made the suggestion to him that he might go into a reorganization under chapter 10, chapter 11 of the Bankruptcy Statute in order to hold off the foreclosure of these, these pressing bills, and he said no, he can't do that, "because I am solvent," and he said, "Here's the statement, this is the financial statement; I am solvent." And I asked him, "Well, how about these notes receivable, accounts receivable, which amount to substantial figures, \$16,000 in notes receivable and \$20,000 in accounts receivable." And he stated those were from various stores that he had sold, these stores, these various stores on a franchise deal and they were to be paid back and due to the bad weather, bad summer, if he [75] would go after the stores and press them for it it would put them out of business, said it would be about 90 days until he gets the money into those.

I looked over these things—I do remember now I questioned him about one item, trying to find it here. "Due from officers, \$1,302"—starts out May

(Testimony of Theodore A. Kolb.)

1, \$554.06; on June 30, it is \$1,132.81; and on July 31, it is \$1,302.81. In other words, increased here.

An item labeled "Due from officers," and he gave me this explanation: When he purchased his own stock for \$15,000 he took a loan on the Pacific National Bank and that the corporation has been paying the interest on that note and that this item right here represents the interest which he was paying on the note, that \$15,000 which he purchased stocks, these monies due from him. It was rather difficult to get anything out of Mr. Loudolf; he was extremely evasive about anything. I tried to pin him down. Frankly, I wanted—on checking, Mr. Loudolf relied primarily on Miss Lee, because she seemed to be more capable, more reliable, and if she said, "I will be there and I will have certain information," she came through with it and he never did.

But it finally culminated that we told Mr. Loudolf we had to have certain financial information in order to give him any further extensions on it by a certain date, otherwise we must consider that he is not going to proceed in accordance [76] with his prior promises that he will work out and have to seek our remedy by execution.

Well, the date came and Mr.—I think it was the end of September—Mr. Loudolf did not come through, did not keep his appointments he had made, and we proceeded to instruct the sheriff to execute on the assets of the corporation.

Mr. Margolis: Your Honor. I am going to object

(Testimony of Theodore A. Kolb.)

to that on the ground it is indefinite, uncertain. If they proceeded to instruct the sheriff to execute, I think we should have the document, some information setting the date, showing the instructions. I think that is important in the proper chronology of this case.

The Court: I don't think the testimony is objectionable. As a matter of fact, I think his testimony is very helpful to you.

Mr. Margolis: Very well.

The Court: Not at all satisfied with the condition of the business and they were pressing.

Mr. Margolis: I will withdraw the objection, Your Honor.

The Witness: I did check with the attorney for one of the largest creditors as I felt that he would have the largest interest in that. I checked with Mr. Connelly who represents Samarkand, who claims to be the largest creditor of Brick O' Gold.

Q. Did the statement show what his account [77] was?

A. Never did. Mr. Loudolf promised to give us a breakdown—this financial statement is just a summary—we wanted to look over the details where these accounts receivable were, if they were in existence.

Q. What happened to that Samarkand account?

A. Samarkand account was about \$15,000 and I checked with Mr. Connelly to find out whether they were in a position to inform me whether this was a solvent business or whether they were going

(Testimony of Theodore A. Kolb.)

to take steps towards enforcement of their account and I was informed by Mr. Connelly they were not going to take any steps, satisfied it was a solvent business and satisfied it would work out, it is a seasonal lag.

So then we wanted—the main thing we wanted, if Mr. Loudolf wouldn't give us a promissory note, we wanted to know what this item of accounts receivable, what it was, because, I stated, "It represented \$20,000, and according to your financial statement, which Mr. Loudolf assured me is still a valid financial condition of the business at the time when I was talking to him, it showed it was solvent, that the assets were in excess of the liabilities," and we wanted to see what these accounts receivable, whether valid, or a bookkeeping entry, and we never got this information from Mr. Loudolf.

Q. Did you ask him about it?

A. We asked him repeatedly.

Q. What did he say? [78]

A. Going to produce—as a matter of fact, I had also talked to Miss Lee about it and she said Mr. Loudolf had the books and have to depend on Mr. Loudolf to produce them.

Q. Did you ask him whether or not those were valid accounts?

A. He said they were valid accounts, but I wanted to know who they were; \$20,000 is a substantial amount of money, represents practically half of his business here and accounts receivable.

(Testimony of Theodore A. Kolb.)

He claimed that these accounts were the licensees, the franchise holders in these various stores and they were accounts that they had accumulated.

Just about that time Mr. Norberg contacted me and said he represented a creditor, that he had——

Mr. Margolis: May we have the date, please?

A. It was the latter part of September, Mr. Margolis. I think we instructed the sheriff to execute the 21st, 22nd of September, 22nd of September.

Q. (By Mr. Berger): Was that about that time? A. 1949.

Q. Did he contact you before or after that date?

A. Mr. Norberg?

Q. Yes.

A. Mr. Norberg contacted me before that, a few days.

Mr. Margolis: May we have that date?

A. The 22nd day of September, 1949, is when we instructed the sheriff to execute. [79]

Q. (By Mr. Berger): When did Mr. Norberg contact you?

A. Two or three days before that.

Q. All right, go ahead.

A. He stated to me that he represented a client and that he had filed a suit against——

Mr. Margolis: Going to have to object on the ground no proper foundation was laid.

The Court: All right.

Mr. Margolis: Persons present, time and place.

The Court: Sustain the objection.

(Testimony of Theodore A. Kolb.)

Q. (By Mr. Berger): Now, at the time when Mr. Norberg contacted you, you say about **two or three** days before the date of execution?

A. Yes, sir.

Q. And how did he contact you, by phone?

A. By telephone.

Q. And did you see him after that?

A. He asked for an appointment, whether he could see me, and he came up and saw me.

Q. And how long after that date did he see you after that appointment?

A. Well, it was within the space of two or three days, before the 22nd of September.

Q. When he came to see you at your office?

A. He did. [80]

Q. Who was there?

A. Mr. Norberg and myself.

Q. And anyone else?

A. Not at that time.

Q. What was said?

Mr. Margolis: Just a moment, we object to the question on the grounds it is incompetent, irrelevant and immaterial.

The Court: What is the question? As to the conversation?

Mr. Margolis: Yes.

The Court: I will exclude it.

Mr. Berger: O.K.

The Court: Tell the result of the conversation, what he did, if anything.

(Testimony of Theodore A. Kolb.)

Mr. Berger: Going to ask that in the next question.

Q. As a result of that conversation, Mr. Kolb, what occurred; what did you do?

A. I transmitted to my clients the information that Mr. Norberg gave me, that he had an account, that he intended to press against Brick O'Gold, and I was instructed by my clients unless they, by a certain date that we gave Mr. Loudolf to give us the breakdown on these accounts receivable, unless that information is received by me and transmitted to them, I was to proceed with instructions to the sheriff to execute against the property of the corporation.

Q. Now, when did you next see Mr. Loudolf or Mr. Norberg [81] after that time?

A. I think I saw him on the date of the execution, the 22nd of September.

Q. Who did you see?

A. I think I saw both Miss Lee and Mr. Norberg.

Q. And where?

A. He was out in Miss Lee's store.

Q. And what occurred, what was said?

A. Well, Miss Lee said they were still trying to get financing, that they had a party interested. She wouldn't give me the name of the party who was supposed to finance about \$15,000 or \$20,000, that they had still, I think, the RFC application pending; she was bitter about the whole thing, she said her whole life savings are depending on this thing,

(Testimony of Theodore A. Kolb.)

that she was waiting for information from Mr. Loudolf which he had not given to her, an officer of the corporation. So I told her so far as we were concerned we certainly did not feel we wanted to hamper any refinancing or jeopardize any chance of her staying in business, we were not going to press them if we are satisfied the statements made by Mr. Loudolf were correct.

Q. And was anything at that time said about the solvency or insolvency?

A. I was still informed that they were solvent, that they were just stretched, and because they didn't have any cash, operating cash, with the suit hanging over their heads—sure they [82] were solvent but they needed working capital, because they were working on a c.o.d. basis for lack of working capital, because all of their assets were tied up in promissory notes from various stores. And the next thing I knew about it was that I had read in the Recorder that an involuntary petition in bankruptcy had been filed. That is the last I did about it.

Q. Did you have any conversation with Mr. Norberg in the presence of Mr. Loudolf or Miss Lee?

A. I think one or two conversations, the time when we had a conference in Miss Lee's store on the 22nd. I know that date, because I know that was the date of the sheriff's execution and I have in front of me the sheriff's return verifying that day.

Q. Did you have any conversation at any time in your office with Mr. Norberg and Mr. Loudolf

(Testimony of Theodore A. Kolb.)

where there was brought into the conversation this financial statement?

A. I think it was after that 22nd Miss Lee said that she was going to bring Mr. Loudolf up to my office, we couldn't get a hold of him, she was going to bring him up to the office.

Q. Did she do that?

A. She did, I think, a day or two later.

Q. Who was there at that time?

A. Mr. Norberg was there, Mr. Loudolf was there, and Miss Lee.

Q. And you? [83]

A. And myself, in my office.

Q. What was the conversation about then?

A. They were going to let us know what these accounts were and the only thing that I remember in that conversation we were told they were still, that they had still had the RFC application pending and going to let us know, and I checked with Mr. LeMasters from the Pacific National Bank, and he confirmed there was an application pending and that no decision had been made by the RFC, but what they needed was working capital, that they appeared to be solvent. That is the banker's statement.

Mr. Margolis: I move that be stricken, may it please your Honor, on the grounds it is not binding on the plaintiff.

Q. (By Mr. Berger): Did this conversation take place during the time they were there, at the particular time?

(Testimony of Theodore A. Kolb.)

The Court: In their presence?

The Witness: Who?

The Court: The president.

A. I don't remember whether they were present or right after.

The Court: I will strike it out.

Q. (By Mr. Berger): Was that conversation during the time that they were there in that office or afterwards? A. I don't remember that.

Q. You don't remember. Was any statement made to you in the presence of Mr. Norberg with reference—withdraw that. Was [84] there any conversation or part of a conversation at that time in your office, any statement made by either Miss Lee or Mr. Loudolf with reference to—

Mr. Margolis: I object to the question, may it please your Honor, on the ground it is leading and suggestive.

Mr. Berger: I haven't finished my question yet, your Honor.

Mr. Margolis: That is the vice of it, I think, your Honor, observed that he might.

Mr. Berger: I will reframe the question.

The Court: Yes, reframe it.

Q. (By Mr. Berger): Mr. Kolb, at that time what was said, if you remember, to Mr. Norberg by either Loudolph or Miss Lee with reference to their solvency or insolvency?

Mr. Margolis: We object to the question again on the ground it is leading and suggestive.

The Court: I will allow that.

(Testimony of Theodore A. Kolb.)

Mr. Margolis: May I finish it this way? Some reference was made to conferences or a conversation with a Mr. LeMasters of the Pacific National Bank, and it is not clear in my mind——

The Court: I am not allowing what he said, I will what one of the officers said, Loudolf or Lee, either one of them said, you may testify to.

A. They both assured they were solvent at that conference. Again they needed refinancing in order to obtain working [85] capital until they were able to collect on these accounts receivable and notes receivable from the various stores, that was a matter of—that would take until about January or February, and that was the statement they made in September, it would be January or February by the time they received these monies and they needed money because Samarkand was not going to extend any further credit and put them on a c.o.d. basis, that they were solvent, assured us of that, that the only thing they needed was working capital, and they said if they don't get working capital and these claims, their debts were being pressed, they might then find themselves at the end of the rope and not be able to operate.

The Court: Notwithstanding those assurances you didn't rely on them and went ahead and pressed your litigation?

The Witness: Your Honor, we had at that time, had already a judgment, we wanted——

The Court: Execution?

The Witness: We issued—that was already

(Testimony of Theodore A. Kolb.)

after we had issued execution that, since the conversation we issued execution, because we wanted Mr. Loudolf to tell us who those accounts receivable were and he didn't come in and refused to tell us who they were and give us the breakdown of it and——

The Court: Well, the execution is usually issued to obtain assets rather than to—answers to interrogatories.

The Witness: Well, the only reason we did proceed that [86] way is because we were satisfied that Mr. Loudolf wasn't going to cooperate and we felt as long as they were solvent, according to his assurances, and there were \$20,000 of assets, if he didn't want to press his debtors we were going to enforce payment of our claim from those debtors and we did, according to the sheriff's return, proceed and levy execution against these stores that he had and returns which I hold in my hand right here the handwriting of the debtor returned, that they held the money, as one, "We hold \$1,200 due Brick O'Gold; we hold the sum of \$534.39; we owe \$1,450 to Brick O'Gold, payable \$50 a month, and paid over to the sheriff of the County of San Mateo, \$33.46." In other words, we have the answers of the creditors—debtors which Mr. Loudolf claimed owed him the money to the sheriff that they do. And the sheriff proceeded with the execution. However, we could not have accomplished the same because the bankruptcy was filed, or when that office filed we were informed, we received notice of in-

(Testimony of Theodore A. Kolb.)

voluntary bankruptcy, we instructed the sheriff to do nothing further.

Q. (By Mr. Berger): Do you remember when you received that notice of the involuntary petition?

A. I saw it in the Recorder. I picked it up in the Recorder some time in the middle of November, called to my attention by one of my associates. He had seen it in the Recorder and I looked it up. It was in there. [87]

Q. One more question—a few more questions. Do you remember during any of those conversations in your office you mentioned something about the Samarkand Ice Cream holding off payment? Was there anything else said by Loudolf or Miss Lee with reference to the Samarkand Ice Cream and this corporation as to their doing business together?

A. Mr. Loudolf mentioned there was some deal pending. He was very vague in all his statements. He mentioned some deal pending where Samarkand was going to refinance Loudolf and take over his plant in Redwood City, which represented the major claim of our people, because they had wired all the machinery down in that plant, supposed to have been a very first rate ice cream plant, according to Mr. Loudolf at that time some deal was pending and negotiations were pending for Samarkand to take over that plant and operate it and pay and try to get a liquidation of their indebtedness

(Testimony of Theodore A. Kolb.)

through rental, or some arrangement that he was making with them.

Q. Mr. Loudolf told you that?

A. Mr. Loudolf told me that.

Q. Mr. Kolb, before you came in here this morning Mr. Loudolf was on the witness stand and he made a statement that you had the financial statement in your hand and you told Mr. Loudolf that with that statement you could get 75 cents on the dollar. Do you remember any such conversation?

A. I don't see how I could have made a statement like that, [88] because I couldn't look over his financial statement, that is a summary, and it shows that his assets exceed the liabilities, and I'm not a bankruptcy expert and I'm in—very rarely handle collection matters of that kind, so I am not familiar, sufficiently familiar to be able to foretell by looking at a financial statement how much percentage he would get on the dollar, and I don't believe I made a statement of that kind, especially in view of the fact that I had the assurance at that time, in letter form and in verbal conversation with Mr. Loudolf, that he was solvent, only in a temporary bind for working capital.

Mr. Berger: If your Honor please, I want to introduce this statement as defendant's next exhibit in order.

Mr. Margolis: We want to object to the introduction of that document on the ground it does not speak of the day of the attachment, but several

(Testimony of Theodore A. Kolb.)

months prior thereto, and under section 6 of the Bankruptcy Act the time of solvency or insolvency is determined from the moment that the attachment or a transfer is made, whether it be voluntary or involuntary.

The Court: Well, both sides have repeatedly referred to and relied upon the statement. I will admit it in evidence.

Mr. Berger: Not only that, Mr. Loudolf said there was no change of condition.

The Court: Admitted.

The Clerk: Defendant's Exhibit D admitted and filed in [89] evidence.

(Whereupon, the financial statement referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Berger: I think that is all, your Honor. Just a moment——

Q. Was there anything at any time said, Mr. Kolb, as to why, or any explanation given to you at any time as to why Mr. Loudolf was on a c.o.d. basis, as you mentioned, and he mentioned?

A. He said he didn't have any working capital, and an ice cream company, I think it was Samarkand, wouldn't extend any further credit.

Q. When was that conversation, about?

A. It was in the latter part of September.

Q. In the latter part of September, and did he tell you when he started on that c.o.d. basis?

A. No.

Q. You don't remember?

(Testimony of Theodore A. Kolb.)

Mr. Berger: That is all. You may cross-examine.

Cross-Examination

By Mr. Margolis:

Q. Mr. Kolb, you testified that with certain levies of execution on the action you mentioned, you represented Pacific Electrical and Maintenance Company against the Brick O'Gold?

A. Pacific Electrical and Mechanical Company.

Q. Pacific Electrical and Mechanical Company. That was action No. 256298, commenced in San Francisco, is that correct? [90]

A. 256298, that's correct.

Q. Now, you told us that you had some conversations on September 22 in your office, or Mr. Loudolf's office?

A. Not in my office. The conversation with Mr. Loudolf present and Miss Lee present, is that the one you are referring to? I think that was the next day.

Q. September—— A. 23.

Q. At that time you explained to them that you wanted to cooperate with them and do whatever was necessary to be done to permit them to lift themselves out of their dilemma? A. That is right.

Q. That was on September 23?

A. Because we didn't obtain any funds under the executions. I checked with the sheriff and—they were all on the properties that we executed on, there

(Testimony of Theodore A. Kolb.)

were two prior attachments, namely the Trumbull suit and the Norberg suit.

Q. Yes, you knew of the Trumbull suit, didn't you?

A. Mr. Loudolf told me about that the first day he came into my office and assigned that as the reason he was in the temporary bind because they attached all his liquid assets, as he stated that his accountant knew where his liquid assets were and he attached all his liquid assets that he had.

Q. You knew about the Trumbull suit?

A. Definitely. He told me about it himself the first time he [91] came in.

Q. Now, you say an associate of yours advised you of the involuntary petition in bankruptcy that had been filed. The record discloses that was filed on November 9, 1949.

A. I was—about the 15th—I didn't know about it until—as a matter of fact, I can fix that date.

Q. I would like you to fix that date. Perhaps I can help you by showing you your file 38302.

A. I can fix it on another basis. That would—it was a day after the sale in one of the stores down there. The sale was on the 14th of November so it was the 15th of November when I found out about it.

Q. You found out about it, and you went ahead with the sale after bankruptcy had intervened?

A. Nobody had informed us the bankruptcy had intervened. The sale was posted.

Q. You informed Mr. Loudolf and Miss Lee that

(Testimony of Theodore A. Kolb.)

you were willing to assist him after these executions were levied and they were returned unsatisfied?

A. If they were going to cooperate with our clients and give them the information which I felt they were entitled to know, if they were to extend credit.

Q. Yes. And you represented here certain returns here that you had received from the sheriff's office that these—advised by the sheriff they were made, is that correct? [92] A. Yes.

Q. Do you have the information with regard to the execution at the premises of 740 Laurel Street, San Carlos?

A. Do you know the owner of that property?

Q. I will ascertain it if that will assist you. It was either Mr. Peters or the Brick O'Gold Corporation.

A. Mr. Peters answered here and in his own handwriting, we owe a promissory note for \$1450, payable \$50 on the first of each month. This will be paid to J. J. McGrath, sheriff, San Mateo County, by writ of execution.

Q. I want to know what happened to the personal property on the premises?

Mr. Berger: I don't think that is within the issues, what happened to the personal property, some other premises, some other time, only interested in——

The Court: Pursued and how he attempted to enforce his remedies.

Mr. Berger: That is true, your Honor, but I

(Testimony of Theodore A. Kolb.)

think the fact is that he did enforce them. What happened after that goes beyond the issue.

The Court: In the nature of enforcing it.

Mr. Berger: Whatever your Honor says.

A. According to the return by the deputy sheriff on behalf of J. J. McGrath, property was sold at an auction sale after advertisement, advertising it at public auction, personal [93] property.

Q. What date was it sold?

A. One lot on the 29th of September, the other lot on the 14th of November.

Q. Who bought the lot on the 14th of November?

Mr. Berger: That is going far beyond the issues. The point was he pursued his remedy, that was sold and I don't think getting the name and address of the buyer, where he got his money, is going to——

The Court: I don't think that matters.

Mr. Berger: It is immaterial, I will object to that.

Mr. Margolis: If I may explain to your Honor, we have testimony on direct examination that as soon as this witness learned that an involuntary petition was filed he instructed the sheriff to cease any steps enforcing this obligation.

The Court: That is for the bankruptcy court.

Mr. Berger: Exactly.

The Court: If I were hearing the whole bankruptcy, I would delve into it, but all I am concerned with is one little section of the bankruptcy matter.

Mr. Berger: That is right.

(Testimony of Theodore A. Kolb.)

The Court: There may be an illegal operation, maybe money due from one to the other, but I have nothing to do with that.

Q. (By Mr. Margolis): Now, you were in constant communication, [94] were you not, with Mr. Norberg beginning at the time of the first visit made there in September, as you testified a little while ago?

A. I wouldn't say constant communication.

Q. Well, you conferred with him on numerous occasions in connection with these matters we speak of now?

A. Mr. Norberg handles all the collection matters for several of our clients.

Q. Yes.

A. And occasionally he contacts me with matters pertaining to collections where a legal issue is involved and asks my advice pertaining to that, because we don't handle collection work in our office.

Q. This matter was not assigned to him, your Pacific National Bank account?

A. Not at that time, because it was in litigation.

Q. Who handled that, yourself?

A. The litigation part our office handles.

Q. When he came in to confer with you in September did you tell him that you already had a judgment?

Mr. Berger: Just a moment, I don't think that is part of the issue; I will object.

The Court: I missed the last word, did you tell him you already had what?

(Testimony of Theodore A. Kolb.)

Mr. Margolis: Judgment.

A. No, I don't think I had the judgment, it was a couple of [95] days. I told him Mr. Gay, I think was the attorney for Brick O'Gold, had agreed to file a stipulation for judgment, but I don't think the first time I talked to Mr. Norberg the judgment had been entered yet.

Q. Did you tell us that the first time you talked to him was September 22, 1949?

A. No, I don't—the first time I talked to him was a couple of days before the judgment.

Q. A couple of days before the judgment. You said there was a conference in your office on September 22, 1949.

A. That is correct.

Q. Present yourself?

A. No, not in my office, the 22nd, the 23rd, the evening of the 22nd—wait a minute, I think out in Miss Lee's store, because we were unsuccessful in obtaining, getting a hold of Mr. Loudolf, nobody knew where he was and——

The Court: The pertinent fact is where was it?

The Witness: Miss Lee's store out at Lakeside.

Q. On the evening of the 22nd or 23rd?

A. 22nd.

Q. Mr. Norberg was there at that time?

A. Yes, he was.

Q. Miss Lee was there?

A. That is correct.

Q. Was Mr. Loudolf there? [96]

A. No.

Q. Did you tell Mr. Norberg at that time that

(Testimony of Theodore A. Kolb.)

you had a judgment entered on September 1, 1949?

A. I don't think I had it entered.

Q. I show you an execution you showed us this morning.

A. Does that show September 1?

Q. September 21.

A. 21. Yes, Mr. Norberg knew it, because that day the sheriff had executed against all those stores.

Q. Yes. And did he tell you he had filed a suit on——

A. I knew——

Q. September 12?

A. I knew, I inquired—the way I got in touch with Mr. Norberg is the sheriff called me back and said when he made these largest of executions that Mr. Norberg's attachment and the Trumbull attachment were ahead of me. That is how I knew Mr. Norberg had a suit pending, but had only attachments on the properties and not executions.

Q. You kept your clients advised of the situation from time to time, did you not?

A. That is correct.

Q. You say that Mr. Loudolf was not cooperating or keeping in touch with you in connection with the payment of the claim which was due and owing to your client, the Pacific Electric and Mechanical Company? [97]

A. He made certain statements that he would present details of that financial statement and never did.

Q. He wrote you a letter on May 31, 1949, which is defendant's exhibit A?

A. Yes.

(Testimony of Theodore A. Kolb.)

Q. Did he not? A. That is correct.

Q. In which he recited, among other things, that he was very unhappy about, "about our inability to meet your bill at this time but we have some problems that will solve themselves in the next 60 to 90 days"? A. That is correct.

Q. And then you wrote him a letter on June 27, 1949, in which you—withdraw that. You wrote first a letter on June 22, 1949? A. That's right.

Q. In which you advised him your clients had turned over to your attention the claim?

A. And we got no response to that letter.

Q. You got no response to the letter of June 22; you wrote him again on June 27?

A. That's right.

Q. And then in that letter you threatened suit if the bill was not paid? A. Yes. [98]

Q. And you got no response to the letter of June 22 which you hold in your hand, and you wrote again on June 27? A. Yes.

Q. And then—

A. We asked him to contact us on or before the 25th day of June. The reason time was pressing, as I remember, I am not positive of the dates, but I think there was a possibility of filing a mechanic's lien against the property down in Redwood City and that is the reason time was pressing at that time, but our clients forewent the filing of the mechanic's lien, enforcement of the mechanic's lien, it was filed but never did file an action to foreclose, because it

(Testimony of Theodore A. Kolb.)

would have embarrassed the contractor who was involved in the thing.

Q. You received the reply to the letters of the 27th and the 22nd, being defendant's exhibit B, dated July 22, 1949?

A. That is right. And then we wrote him another letter asking him to come and discuss it so we could get some facts, and that is when he came in and started giving promises and never keeping them.

Q. May I have that letter?

A. You have it in evidence.

Q. You say you wrote him another letter; you have reference to this letter of July 12, 1949?

A. That is in response to his letter of July 2.

Q. You say, "Unless the above is not completed on or before [99] the 18th day of July, 1949, suit will be commenced against Brick O'Gold Corporation."?

A. That is right, and he never did come in then until after we filed the suit. He never responded to that letter.

Q. You told your clients of the irresponsibility of Mr. Loudolf, did you not, with his not keeping his promises in coming to see you?

A. That is right.

Q. And notwithstanding that they asked you to give his personal guaranty to a promissory note?

Mr. Berger: Just a moment——

A. They were interested in the personal guaranty of Mrs. Lee.

The Court: What is the objection?

(Testimony of Theodore A. Kolb.)

Mr. Berger: I think it is argumentative.

The Court: It is cross-examination.

A. (Continuing): They weren't interested in Mr. Loudolf's financial guaranty under his financial statement, they were interested in Dr. Lee and Miss Lee. They knew they were responsible parties.

Mr. Margolis: I move the answer be stricken on the ground it isn't responsive and ask the reporter to read my question.

The Court: All right, strike it out.

Mr. Berger: I think the answer made was in answer to the question. I believe it should [100] stay in.

The Court: Well, gentlemen, I don't see—I have heard a great deal of testimony as to these parties not having much confidence in—as to Mr. Loudolf, and I don't see any use of testifying over and over again. He didn't answer letters and he didn't come in to see them. Doesn't particularly matter whether it is in or out.

Mr. Margolis: Very well, your Honor.

Q. The fact remains that your client, you, at your client's suggestion as contained in this letter requested the additional security by calling for the signature of Mr. Loudolf, Dr. Etta Lee and Miss Nellie Lee, as contained in your letter of July 12, 1949, defendant's exhibit C?

A. That is correct. It is standard procedure by the Pacific Electric and Mechanical Company.

Mr. Margolis: Move the standard procedure be stricken on the ground it isn't responsive.

Mr. Berger: I think it is responsive.

(Testimony of Theodore A. Kolb.)

The Court: Gentlemen, even I have finally apprehended there was dissatisfaction with the account and wanted either money or security.

Mr. Berger: Or someone's signature.

The Court: I don't see any use of going over it and over it and over it.

Q. (By Mr. Margolis): You advised your client, did you, of the pendency of the Trumbull suit? I don't know whether I [101] asked you that question.

A. I mentioned it to them after I found out about it.

Q. And did you also tell him what Mr. Loudolf and what Mrs. Lee informed you about the accounts receivable, namely, that because of the bad seasonal weather the pressing of those accounts receivable would have the effect of putting those franchise holders, or stockholders, out of business?

A. Yes, I talked to him, I discussed the matter very thoroughly with Mr. Farrel, who is the manager.

Q. And these conversations——

Mr. Berger: Are you finished?

A. (Continuing): Manager of Pacific Electric.

Q. (By Mr. Margolis): These conversations took place, you say, in September?

A. Right after the conversations with Mr. Loudolf and Miss Lee.

Q. And you know of your own knowledge that the season, the ice cream business in September is sort of off?

(Testimony of Theodore A. Kolb.)

Mr. Berger: Just a moment——

A. I don't know that on my own, except down on the Peninsula it gets pretty warm. When you have a pretty cold summer you do get a warm fall.

The Court: He doesn't know of his own knowledge.

Mr. Margolis: I have no further questions.

Mr. Berger: No further questions.

The Court: You may step down. [102]

The Witness: Thank you very much.

Mr. Berger: He may be excused with your Honor's permission?

The Court: Yes, Mr. Kolb is excused. You may proceed with the plaintiff's case.

Mr. Margolis: Miss Lee.

NELLIE LEE

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please? A. Nellie Lee.

Direct Examination

By Mr. Margolis:

Q. Miss Lee, you are an officer of the corporation Brick O'Gold?

A. Yes, I was secretary.

Q. And were you secretary during the month of September and continuing thereafter until the bankruptcy proceedings were initiated?

A. Yes, I was.

(Testimony of Nellie Lee.)

Q. Do you know Mr. Norberg?

A. The first time I saw him——

Q. Do you know Mr. Norberg?

A. Well, I have met him a number of occasions.

Q. Can you tell us when you met him, the first occasion, approximately when, if you can give us the date, the month and [103] the year.

A. I would say some time in, probably the first part of September, as I remember.

Q. Of what year? A. 1949.

Q. And where did you meet him?

A. I was working at the Lakeside store at that time and he came out to see me there.

Q. Who was there at that time?

A. On the first occasion I was there alone.

The Court: Lakeside store is one of the franchise stores?

The Witness: That is right.

Q. (By Mr. Margolis): Who operated the Lakeside premises? A. I did.

Q. It was owned by yourself?

A. That is right. The first time he came in it was in the morning and I had just opened the store shortly, and he introduced himself and says that he was a collection agent and collecting money for one of the accounts Brick O'Gold Corporation owed money to. Asked if I was familiar with it and I said I was, and of course we discussed that. We had, the corporation had owed this money for quite some time and he was, wanted to collect on it, so we talked about the condition of the company, because

(Testimony of Nellie Lee.)

I all along, I was, since January until June or July, I had worked full time at the Brick O'Gold [104] office at Redwood City, which is the main office.

Q. I don't want to lead you off—if you will just tell the Court in answer to my questions, tell the Court what hapened and in the presence of Mr. Norberg or any other witnesses—I might ask you what happened before that?

Mr. Berger: Your Honor please, I was going to make a motion to strike that out by reason of the fact no question whatsoever was asked with reference to a conversation, but nevertheless the witness proceeded to give a story. Bring that to Your Honor's attention.

The Court: So far the story hasn't been very helpful.

Mr. Berger: No, either way, just shows you the——

Mr. Margolis: I don't think——

The Court: Counsel will ask you questions, just answer those questions.

Q. (By Mr. Margolis): As a matter of fact, I interrupted the witness from making an answer to a question when I tried to lay the foundation, so it is unnecessary to take up the time of the Court. Now, were you familiar with the operations of the corporation and its business affairs? A. Yes.

Q. And you knew that the amount of this claim that Mr. Norberg came out to collect, as you have told us, was past due for some time?

A. Yes. [105]

(Testimony of Nellie Lee.)

Q. Will you tell the Court substantially what occurred in that meeting when he came out; what you said to him and what he said to you.

A. Well, he asked me about the condition, the financial condition of the company. I told him that we were in financial difficulties, we didn't have the money, wanted to pay our creditors, but weren't able to. So he said what do you want us to do about it? I told him at the present time we were working very hard with a number of parties seeking additional capital.

Q. Yes; did he ask you any questions?

A. He asked also if they were the only ones we owed money to. I said no, there were numerous ones. He also asked if they were the largest or the smallest, and I said we had many larger and many smaller. And he asked how we intended to take care of our obligations, and I felt that we were really in a very serious condition, didn't have the money to pay them and we were working, trying to get additional capital.

Q. You told him that? A. Yes.

Q. What did he say?

A. He seemed to be very conscientious and asked what other assets we had, whether we had stores that owed the company any money or not, and I said yes, they did, because I for myself owed money, the Lakeside, and I know I owed money, but [106] I couldn't pay because we were just starting the business and we were overly hopeful and we just kept getting behind.

(Testimony of Nellie Lee.)

Q. You had a franchise from the corporation and you were operating the store?

A. The Lakeside store was mine.

Q. This conversation took place——

A. The first conversation when I met him, yes.

Q. Anything else said at that time by you and by Mr. Norberg, and if so, tell it to the Court.

A. He asked whether there were other creditors. I said there were, so he said what do you intend to do about that and I said we had to get additional capital and then would give them a certain payment and the rest have to be on a payment plan. He said he wasn't interested in other companies, interested in his own, just collecting for his one client.

Q. How long did this conversation take place?

A. There were interruptions, because I was working at the store myself and when the customers came in I had to stop, but I would say the conversation, I would say that he was there for at least twenty minutes.

Q. And was there——pardon me.

A. (Continuing): He asked where he could find Mr. Loudolf and I said, "Well, I think Mr. Loudolf will call me later in the day." We did keep track of each other. Mr. Loudolf, he was out seeing different parties trying to get them to put money [107] in the company.

Q. And were there any other conferences subsequent to the one you have just related?

A. Yes.

Q. Where did that——

(Testimony of Nellie Lee.)

A. Made an appointment for the very next morning for Mr. Loudolf to meet at the Lakeside store.

Q. Who made the appointment?

A. Well, he asked me to see if I could locate Mr. Loudolf.

Q. Go ahead.

A. Mr. Loudolf called, so I made the appointment for the next day. Mr. Loudolf came, Mr. Norberg came out and I went down to the store, sat on the side table. I didn't participate in the conversation.

Q. You took no part?

A. In that second meeting, no.

Q. Now, subsequent to that second meeting were there any other conferences held there or any place else?

A. I would say not until after the attachment was entered. I had seen Mr. Norberg at Mr. Kolb's office, I would say, a number of times, about three times.

Q. Who arranged those appointments at Mr. Kolb's office?

A. I don't remember for sure, but I think it was Mr. Kolb called me at the Lakeside store. Naturally he was very concerned about it. [108]

Mr. Berger: Just a moment, that is not responsive. The question was, who called?

Mr. Margolis: It may go out.

Q. Just tell us what took place and not your feelings about it, Miss Lee. Do you know who

(Testimony of Nellie Lee.)

arranged for the first conference that you now suggest was over at Mr. Kolb's office? If you do, tell us; if you don't tell us that.

A. I don't remember which one of the gentlemen called me, but I knew it was concerning about the Norberg case because I was—we all were concerned about it because of the suits——

Mr. Berger: Just a minute; move to strike the last of that.

The Court: You needn't go into that.

Q. (By Mr. Margolis): Where did that take place, this subsequent meeting?

A. You mean on the third meeting?

Q. Yes. A. At Mr. Kolb's office.

Q. Who was present?

A. Mr. Norberg, Mr. Kolb and Mr. Loudolf and I.

Q. Could you tell us substantially what was said at that time? Did you participate in the conference? A. Yes.

Q. Did you make any statements to either of the gentlemen present? [109]

A. Yes, I would say I did.

Q. And will you tell the Court substantially what you said and what was said to you in response thereto?

A. Well, we were concerned, we were trying to get them to lift the attachment.

Q. Tell us what was said.

A. I told him the company was in very serious financial trouble.

(Testimony of Nellie Lee.)

Q. Yes.

A. And I didn't think it would really go through unless we had additional capital, naturally we were very concerned not having the company going, because it isn't not only the money put in ourselves——

The Court: You needn't tell that. Anyone that has money in a company that is about to go on the rocks is concerned, that is human nature. I fully understand that, but there is no use for her to tell it again. It is objectionable.

Q. (By Mr. Margolis): Can you tell us what was said by yourself to these gentlemen, not what you are naturally interested in, what you said and what they said to you?

A. Actually the company didn't have the money to pay them.

Mr. Berger: I move to strike that.

The Court: Well, I will strike it. Did the company have the money to pay it?

The Witness: No, we did not.

The Court: There is your response. [110]

Q. (By Mr. Margolis): And what was said about the attachment, the lifting of the attachment; you just mentioned something about it. Did you say something to somebody about the lifting of the attachment?

Mr. Berger: That is certainly a leading and suggestive question, your Honor.

The Court: Well, I think it is.

Mr. Margolis: I will reframe it.

(Testimony of Nellie Lee.)

Q. Tell us what was said at this particular conference by yourself and to whom you said it, substantially the words you used.

A. I told them the company didn't have the money.

Q. All right, what else was said?

A. And then they asked how they were going to get paid.

Q. All right, who asked that?

A. Mr. Norberg asked how they were going to get paid if we didn't have the money.

Q. What did you say in response to that?

A. In order to solve the problem I told them that we were trying to get additional capital. We didn't have the money at that time to pay them, but if we would get additional capital we would pay it on the equal plan. They were not the only creditors.

Q. You told them they were not the only creditors? A. That is right. [111]

Q. Did you discuss the financial condition of the Brick O'Gold Corporation at that time other than what you have just related?

Mr. Berger: That is a leading and suggestive question, too, your Honor.

The Court: Yes, I think she has told a pretty full discussion.

Mr. Berger: Yes.

Mr. Margolis: Submit the objection.

The Court: You may ask if anything else was said.

Q. (By Mr. Margolis): Can you tell us?

(Testimony of Nellie Lee.)

The Court: And if the answer is yes, say what it was.

Q. (By Mr. Margolis): Was there anything else discussed on the occasion of this conference, a portion of which you have just related to us? Did you hear me? A. I didn't quite understand it.

The Court: Miss Lee, you have testified as to certain conversations had among the four of you. Is there anything else that was said there that day and at that time in regard to the company affairs, pro or con; do you have a recollection?

A. I told them if they did not lift the attachment they would force the company into bankruptcy. Naturally exerting all efforts to avoid that.

Q. To whom did you say that?

A. To both Mr. Norberg and Mr. Kolb.

Q. At the time of this conversation? [112]

A. Yes.

Q. Was there any response to that made by either of the gentlemen you have mentioned? Did they say anything in answer to that?

A. Mr.—they said, either get their money or they didn't care, just as soon be in bankruptcy.

Q. Who said that?

A. I believe it was Norberg that said that.

Q. Was there any subsequent conference had other than the one you just related, or was that the last one? A. You mean at the office?

Q. Any place.

A. I would say there was two other meetings and all went over the same thing.

(Testimony of Nellie Lee.)

Q. And where were those two other meetings held? A. I believe at Mr. Kolb's office.

Q. Who was present at those meetings?

A. At one occasion just Mr. Kolb and Mr. Norberg and I, and the other occasion, Mr. Loudolf, Mr. Kolb and Mr. Norberg.

Q. At this last occasion you speak of was there any discussion in addition to——

Mr. Berger: When?

Mr. Margolis: I think, counsel——

Q. Now, can you tell us with reference to this first conference in Mr. Kolb's office to which you testified a moment ago, when that next one was held at which time both Mr. Kolb and [113] Mr. Norberg and then you and Mr. Loudolf were present?

A. I would say about two days.

Q. Two days. And was there anything else discussed at this last conference other than your statement that we went over the same things?

A. I asked for the financial statement.

Q. Who asked for it?

A. I believe both of them did.

Q. I see, and what was the response?

A. We brought the financial statement and they wanted a breakdown of the accounts receivable, and the reason why we didn't tell at that time, because they always acted in such confidence and kindly manner, but as soon as we gave the information they turned around and attached, and we were trying to avoid any further attachments or suits.

(Testimony of Nellie Lee.)

Q. This conference took place after the attachments were made? A. Yes.

Q. Is that correct? A. Yes.

Q. And suit was filed on September 12 by Norberg? A. Yes.

Q. Was there anything else discussed at this last meeting you speak of in addition to what you have already told us?

A. Well, I think the question really resolved on how they were getting paid and how quickly they could be paid. [114]

Q. Reiterated what had taken place before?

A. Yes.

Mr. Margolis: You may cross-examine.

Cross-Examination

By Mr. Berger:

Q. Miss Lee, you are an officer and have been an officer of this corporation?

A. That is correct.

Q. And when did you become—did you hold any office besides director—I assume you were a director of the corporation, were you not?

A. That is right, I was secretary.

Q. Secretary from its inception?

A. From the beginning.

Q. From the beginning. And as such did you have any knowledge of the business affairs of the corporation as such secretary?

A. You mean knowledge and experience?

(Testimony of Nellie Lee.)

Q. No, knowledge of how the business or corporation was going along.

A. I was active in it all the time.

Q. You were active, o.k. How much stock did you hold in the corporation?

A. About \$10,000.

Q. Did you pay for it in cash?

A. That is right.

Q. And that was all the stock was subscribed for, was it? [115]

A. It was for stock in the corporation.

Q. Now, Miss Lee, you said that you were, you had a meeting and you were quite active—had a meeting in the office of Mr. Kolb and quite active in the corporation at the time. What did you do, did you keep any records of the financial condition of the corporation? A. The bookkeeper did that.

Q. Did you have any access to any records or financial condition of the corporation?

A. Access to it?

Q. Yes. A. Yes, I did.

Q. Did you ever check them? A. Yes.

Q. You looked them over quite thoroughly, did you, whenever you wanted to?

A. Whenever I wanted to.

Q. Did you ever look them over at any time prior to September, 1949?

A. I believe so, yes.

Q. I show you defendant's exhibit D. Did you ever see this financial statement before?

A. Yes, I did.

(Testimony of Nellie Lee.)

Q. And you were well acquainted with it, were you, at the time it was made? [116] A. Yes.

Q. You knew all about the financial condition of the corporation as reflected by that financial statement prior to its being made, is that correct?

A. Yes.

Q. What was the purpose of making that statement, do you know, Miss Lee, in July, 1949?

A. We had Trumbull, who was doing our accounting for us, for the company, and also for the other franchise stores and the work he did was not satisfactory.

Q. I asked what the purpose was.

Mr. Margolis: Just a moment, I think she is entitled——

Mr. Berger: All right.

The Court: Yes.

Q. (By Mr. Berger): Go ahead, I am sorry, I didn't mean to interrupt you.

A. (Continuing): He was not satisfactory, and due to that they filed a suit against us because their work had not been satisfactory, the reason that the stock was never issued——

Q. I asked you——

A. I am coming to that, if you don't mind. So because of that and also all along we were having some difficulties, as all new businesses are, we had many problems and since we owed money our creditors got, naturally, more concerned, especially with a new company; that is why we had the [117] certified accountant make this statement for us.

(Testimony of Nellie Lee.)

Q. What was the purpose of the statement?

A. What is the purpose of the financial statement?

Q. Who did you ask to prepare that statement?

A. This?

Q. Yes.

Mr. Margolis: We object to the question, assuming something not in evidence, whether she asked it be——

Q. (By Mr. Berger): Who prepared this statement?

The Court: She will know what accountants did it.

The Witness: Yes.

Q. (By Mr. Berger): Yes. Who prepared this statement?

A. That was copied from the worksheet of the Burrows, Parker, Carson & Harms, C. P. A. accountants in San Francisco.

Q. Was this statement prepared for the purpose of asking the RFC to obtain a loan of money, do you remember?

A. That statement was prepared for that, naturally, trying to get additional capital, have to have a financial statement.

Q. This was prepared for the purpose of getting additional capital?

A. That and also necessary for the bookkeeping itself.

Q. This statement represented a true and correct picture of the corporation, does it?

(Testimony of Nellie Lee.)

A. Should I doubt the CPA?

Q. Do you know of your own knowledge? If you don't, you may [118] answer so.

A. As far as my knowledge, I would say that is correct.

Q. O.K. Now, you were served with a summons in a suit some time in September, were you not? In the suit brought by Mr. Kolb's office, you were the party that was served with a summons?

A. Was it served at the Lakeside store?

Q. I don't know; you would know better than I would.

A. We received so many suits at that time I wouldn't say whether I received it or one of the other officers.

Q. Who were the other officers besides yourself?

A. Miss Etta Lee, myself, and Mr. Loudolf.

Q. Three of you? A. Yes.

Q. Who is Etta Lee? A. She is my sister.

Q. Where is she?

A. She lives in Richmond.

Q. Richmond, California?

A. But never active in the company.

Q. And was she ever over in San Francisco or in the Lakeside store?

A. Not in the Lakeside store, I am in there myself.

Q. Over in San Francisco?

A. Just occasionally, once or twice a week [119] only.

(Testimony of Nellie Lee.)

Q. And you said you received a number of summons during the month of September, did you?

A. In the month of September.

Q. Or October? A. Yes, I would say yes.

Q. And what did you do with those summons? Did you bring them to Mr. Loudolf?

A. Mr. Loudolf always had access.

Q. I asked you whether or not you brought them to Mr. Loudolf; do you remember?

A. If they were served to me in the Lakeside store, I was working at the time at the Lakeside store, stayed at the Lakeside store; Mr. Loudolf came out, and naturally I would show them to him.

Q. You would show them to him? All right. Now, at the time Mr. Norberg first came out there, Miss Lee, isn't it a fact that the only conversation he had with you and all he was interested in was a payment of this claim and only talked a few minutes with you about the claim that he had, isn't that correct?

A. The only thing he talked about was collecting the—for his client.

Q. That is all, he didn't ask you about anything else other than collecting that money for his client?

A. Oh, he asked me about the company. He asked the financial [120] condition of the corporation and what our plans were.

Q. And did you tell him anything at all about this financial condition as represented by this exhibit?

(Testimony of Nellie Lee.)

A. I didn't have the statement with me in the store at that time.

Q. But you knew about it at that time, did you not?

A. I told him, yes, I talked about the financial condition of the company.

Q. And did you give him any information about the financial condition of the company as set forth on this statement?

A. Unsupported statement, why did I just pull figures——

Q. You knew about the statement and the figures?

A. I knew about the condition of the company.

Mr. Margolis: Just a moment. I object to the question.

Mr. Berger: All right.

Mr. Margolis: As argumentative.

The Court: I don't think it's argumentative. She knew about it.

Q. (By Mr. Berger): And did you tell Mr. Norberg at that time when he first came out to see you that this statement showed—that is, that you had a lot of accounts receivable, that your financial condition was sound as set forth on the statement?

A. I told him that we had accounts receivable and if we could collect them we would be able to pay our creditors quite well, but not be able to collect from them at all, not even pressing. [121]

Q. Did you make any attempt to collect them?

A. Yes, we did. We sent out statements and

(Testimony of Nellie Lee.)

told them and tried to go and see them in person, the different stores.

Q. You said you were not even pressing?

A. What do you mean, you want to close them up? Naturally, the company didn't want to close the stores up.

Q. You didn't press for the payment?

A. With the stores closed, the company was finished anyway right at that time.

Q. You did not press them for payments did you?

A. We asked certain—wrote them statements, went to see them for it.

Q. You remember this conversation that you had in Kolb's office when Mr. Kolb was there and you were there and isn't it a fact that both you and Mr. Loudolf told Mr. Kolb at that time when this statement was presented, presented rather, that you were financially sound. Do you remember telling him that as testified to by Mr. Kolb this morning?

A. We told him we were sound, but we needed time. Without the time we would not be sound.

Q. And do you remember a conversation with reference to the so-called reorganization as mentioned by Mr. Kolb?

A. I didn't understand.

Q. Do you remember Mr. Kolb making a statement on the witness stand today that he suggested that you reorganize your [122] organization under a certain section of the Bankruptcy Act. Do you remember such a conversation?

A. Yes.

(Testimony of Nellie Lee.)

Q. And do you remember whether or not Mr. Loudolf said he didn't want to do that, because they were sound?

A. I would not believe Mr. Loudolf said that.

Q. You don't believe, but you are not sure, are you?

A. The only thing I know about, when we were up in the office, "I know the company is in very critical condition, yes, I know very well," said to Mr. Kolb or Mr. Norberg because we were still trying to save it, as I had told them and the parties that would have a chance to save it. In fact, they asked me to say where we were trying to get capital from. I did not tell, we did not tell them, they would go and see the other person and kill our chances later.

Q. I asked you a question, Miss Lee. Ask the last be stricken. I asked you the question as to whether or not you made the statement to Mr.—either you or Mr. Loudolf in your presence made the statement to Mr. Kolb that you did not want to reorganize because you were solvent. Was that statement——

A. I don't believe he said it.

Q. Are you positive it wasn't said?

A. I am quite positive it wasn't said.

Q. Is it not a fact that Mr. Kolb asked you for a breakdown of some of these accounts receivable on a number of occasions? [123]

A. Yes, he did.

Q. And did you give it to him?

A. No, I did not.

Q. So your whole concern, really, isn't it a fact,

(Testimony of Nellie Lee.)

Miss Lee, that your own concern was that you did not have at that time the money with which to pay your bills? A. We did not have the money.

Q. Isn't that correct? A. That is correct.

Mr. Berger: That is all.

Mr. Margolis: You have no further questions?

Mr. Berger: Just a moment.

Q. Miss Lee, did you make any entries at all in the books for the corporation, do any kind of book-keeping for the corporation?

A. No, I did not, except that after the corporation was on a c.o.d. basis, then I had to make the entries.

Q. When did it become on a c.o.d basis?

A I believe in August.

Q. In August, and you were then taking care of the books in August?

A. Just the daily entries.

Q. Receive a salary for that?

A. No, I wasn't.

Q. Isn't it a fact, Miss Lee, that you told Mr. Norberg when he [124] was there to talk to you, isn't it a fact that you told him you were receiving \$200 a month from the corporation as such book-keeper?

A. I did not, I did not receive—I never told him I received that.

Q. I just ask you the question, Miss Lee.

Mr. Berger: That is all.

Mr. Margolis: No further questions.

The Court: You may go down.

(Witness excused.)

Mr. Margolis: We would like to offer in evidence, your Honor to complete the plaintiff's case, the file, No. 38302-G, the bankruptcy proceedings.

The Court: Consisting of what documents?

Mr. Margolis: The schedules, your Honor.

The Court: Yes, the schedules should be in.

Mr. Margolis: There is no dispute as to the date of the filing, of the inventory. We won't burden the court.

Mr. Berger: Any records you show when it was adjudicated?

Mr. Margolis: I don't think that is important.

Mr. Berger: Yes, it is.

Mr. Margolis: Well,—

Mr. Berger: No notice goes out until there is an adjudication.

The Court: Yes, I think we want the date of the adjudication. [125]

Mr. Margolis: All right, your Honor.

Mr. Berger: One until the notices go out and the notices do not go out until after adjudication.

Mr. Margolis: I think the final date is, but all that is the date of the filing of the petition.

The Court: Well, the complaint alleges that the adjudication was on November 28th.

Mr. Margolis: That is correct, it is here, your Honor.

Mr. Berger: That is what I wanted.

Mr. Margolis: We offer that as plaintiff's exhibit next in order, your Honor.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon, the file, case No. 38320-G in bankruptcy, marked Plaintiff's Exhibit No. 5, in evidence.)

Mr. Margolis: That is the plaintiff's case, your Honor.

The Court: Proceed with the defense.

Mr. Berger: At this time, your Honor, may I make a motion, if the Court please, for a non-suit upon a number of grounds.

The whole gist of the case is to whether or not the defendant knew or had reason to know or reason to believe that the date of the attachment of September 12th, whatever it was, September, 1949, that Mr. Loudolph and the corporation was insolvent. Now, the mere fact on a contract you are unable to [126] pay the bills, unable to pay money is not in and of itself an act of bankruptcy, or is not in and of itself knowledge that the people are insolvent. It was testified to by Miss Lee that the primary purpose was to get time, because it didn't at that time, have the cash, although in their own statement and which your Honor can take into consideration, Defendant's Exhibit D, statements made by Mr. Kolb, certainly he has no interest in that one way or the other, that not only was he told by Mr. Norberg and in his presence was told and according to the statement that they were solvent at that time. Now, if they were solvent at that time and the defendant were so informed, certainly where is the reason to believe, and must be more than just a suspicion, that the people are insolvent, must be something more, and in fact the courts

held a number of times first, two conditions must exist, or three conditions must exist, that at the time of the levy and within four months the defendant must be insolvent. In other words, while he is insolvent and the question whether he was insolvent, if he was insolvent, and also the date of the levy. That is one thing, but the defendant must know that fact, not a mere suspicion. The mere fact of being unable to pay the bills, the mere fact of not having enough money to pay the bills with, the mere fact of being financially embarrassed in and of itself is not sufficient grounds, sufficient reasons to hold,—I have the authorities here, the rule that the defendant had [127] that knowledge or the rule that the man is or is not insolvent, stated in the case of—I have a copy of this brief I would like to present it, if necessary, the case of Grey against Little, 97 Cal. App. 442.

“The fact, alone, that a creditor knows his debtor to be financially embarrassed and pressing for a payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent.”

Many cases—Cate against Certain-Teed Products Corporation, 23 Cal. 2nd 444. The Court stated the general rule in that regard as to what constituted reasonable cause, citing the case of Grant against First National Bank, 97 U. S. 80, then goes on to say, I will just read the high spots of it, your Honor please, don't wish to take too much time. That:

“It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor’s insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing [128] circumstances, and yet have no cause for a well-grounded belief of the fact.”

Digressing a moment here, not only did he have no grounds, but he was told by the President of the corporation with the statement that they were perfectly solvent.

The Court: Well, I think he had very good grounds and I think he acted very wisely in choosing and attempting everything possible to get rid of his indebtedness.

Mr. Berger: You mean he had good grounds to proceed?

The Court: Yes.

Mr. Berger: Well, by that your Honor means reasonable cause to believe that the man was not solvent in September?

The Court: I certainly think so.

Mr. Berger: Well, that is a matter of your Honor’s conclusion. I may state, according to these authorities, the mere fact of being unable to pay,

financially embarrassed, is not sufficient grounds.

The Court: That is very true. We have plenty of testimony here, including you, that these people were greatly concerned, they didn't believe the representations and the financial statement, went behind it, made inquiry, and they directed their lawyer to get their money or get security.

Mr. Berger: The reason they didn't believe him was because two reasons, first, that they contended they had no cash because of a tie up in a fictitious suit, that is claimed, and second, [129] because they couldn't rely on Mr. Loudolph by reason of not keeping appointments by reason of not doing anything toward keeping of his promises had he kept his appointments.

The Court: These are very good reasons to suspect an organization and I am put on notice that there is something wrong.

Mr. Berger: It may be possible he is that type of an individual, that is the way he does business, and still the business in and of itself—this is a corporation—the business in and of itself——

The Court: I am sorry, I don't agree with you. I will refuse your motion.

Mr. Berger: I will continue on for a few moments, your Honor. May it also be a fact, just because a party is unwilling to trust him further, just what your Honor just stated, "He may feel anxious about his claim, and have a strong desire to secure it—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment on a debt, under such circum-

stances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men, constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. * * * To [130] overrule and set aside all his transactions with his creditors, made under such circumstances * * * would make the bankrupt law an engine of oppression and injustice. Hence, the Act, very wisely, has we think, instead of making a payment or a security void for a mere suspicion of the debtors insolvency requires, for that purpose, that his creditors should have some reasonable cause to believe him insolvent."

Now, where is the reasonable cause as far as Mr. Norberg is concerned? In view of the statement being rendered and in view of the fact of the—not only the written statement, but the verbal promises, statements made in Kolb's office that they were solvent at that time. He refused a reorganization as suggested by Mr. Kolb, and then continuing on—Collier's on Bankruptcy, Volume 2, chapter 60, page 1298:

"But the proof of such 'reasonable cause to believe' is now to be directed to the effect of the transfer, rather than the intent of the debtor in making it. There must be proof, both of insolvency of the bankrupt at the time of the transfer and reasonable

cause to believe on the part of the transferee that such transfer would effect a preference, * * *

“On the other hand, when debtor is in failing or insolvent circumstances, he has a right to prefer one creditor in preference to another, and if accepted by the creditor in good faith such preference will be sustained, even though it has the effect to delay, hinder or defeat other creditors. Where a [131] debtor pays and a creditor receives the amount of a just debt, the good faith of the transaction will be presumed, but upon proof that a voidable preference resulted the initial presumption is destroyed.”

The burden of proving that is upon the trustee. He must prove both of those points, he must prove every point that he now urges: one, that there was prejudice; two, there is knowledge of the insolvency to such an extent that it is more than just mere suspicion.

That goes on to the question of financial condition, and the statement in and of itself—if your Honor desires to check it over—shows that as of July the financial statement was a \$97,688 asset and a \$64,000 liability; their assets far in excess of their liabilities. Now, relying upon that statement, this, mind you, is prepared by the bankrupt itself, no one else, and prepared long before the petition in bankruptcy was filed against them. In July of 1949, as regards that condition then and as testified to by the bankrupt, they remained in that condition up until the date of the bankruptcy. Why? Whereas, then either somebody is not telling the truth, either

the financial statement is wrong, or Mr. Loudolph is not telling the truth.

The Court: You didn't rely upon the statement; your own testimony is after they saw the statement they were not satisfied with it; couldn't get the president of the corporation to elucidate it. I refuse your motion. [132]

Mr. Berger: Mr. Norberg.

JAMES R. NORBERG

called as a witness for and on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. James R. Norberg.

Direct Examination

By Mr. Berger:

Q. And what is your business or occupation, Mr. Norberg? A. Collection agency.

Q. You operate under what name?

A. Norberg Adjustment Bureau.

Q. And do you know Mr. Loudolph, do you?

A. Yes.

Q. When was the first time you had occasion to meet him? A. September 10, 1949.

Q. Where?

A. At the Lakeside Store of Brick O'Gold.

Q. Who was present at the time?

A. Miss Nellie Lee, Mr. Loudolph and myself.

Q. Was that the first time you were there?

A. No.

(Testimony of James R. Norberg.)

Q. When was the first time you were there?

A. September 9.

Q. And who was present at that time? [133]

A. Miss Lee and myself.

Q. And September 9, you say? A. Yes.

Q. Why did you go there?

A. It was an account assigned to our office for collection.

Q. By whom?

A. Radio Station KJBS, giving the principal place of business of the debtor concern being Brick O'Gold as Redwood City. I drove down to Redwood City and saw the girl in the office there, who told me I would have to see either Miss Lee or Mr. Loudolph, and they could be reached in San Francisco. So I came back to San Francisco and at that time met Miss Lee at the store.

Q. That was on September—what date?

A. September 9.

Q. And what was the conversation at that time?

A. I made demand upon Miss Lee for the amount of the account in full, and she told me that I would have to come back the next day, that she didn't have the money right then; however, she would arrange it and pick up the money the next day.

Q. Was there anything else said about any other accounts? A. Not at that time.

Q. Well, can you relate as fully as you can that whole conversation that first day you were there with Miss Lee?

(Testimony of James R. Norberg.)

A. I wasn't there but a few minutes the first day. [134]

Q. What was the total conversation at that time?

A. Make a demand, when I made a demand on her for the amount of the claim——

Q. Yes.

A. And she told me that I would have to see Mr. Loudolph and they would have the money the next day, that Loudolph would also be there, for me to come back the next morning.

Q. Did you go back the next morning?

A. I did.

Q. And who was present at that time?

A. Mr. Loudolph, Miss Lee and myself.

Q. What was the conversation then?

A. Incidentally, there was someone else, a Mr. Padilla.

Q. Who is he?

A. He was an employee of mine at the time.

Q. Employee of yours? A. Yes.

Q. Is he with you now? A. No.

Q. What was the conversation at that time?

A. I dropped in to pick up the check, I told him I had come for the check. They said they didn't have the money, that the corporation was in a position where they didn't have enough cash on hand to pay that kind of money out, because the account was in excess of \$1,000 and that they were working on something [135] and would have the cash for me immediately.

And I asked what they meant by "immediately."

(Testimony of James R. Norberg.)

They said, "Well, they had hoped they would have it by that morning." However, Mr. Loudolph had an appointment with some other gentleman that afternoon—this was on a Saturday—and he was to see this man that afternoon at his home and go, work out arrangements with some man, they were borrowing some money to put into, reactivating the corporation, and that he would have a check for me by Monday without fail. I told him if I had a check by Monday, all right; if I didn't I was filing a suit.

Q. Anything else said by Miss Lee or Mr. Loudolph in reference to the condition of the corporation?

A. No, they said all right, the only thing was they didn't have enough ready cash on hand for someone to walk in and demand \$1,000 cash.

Q. And did they tell you why they didn't have enough ready cash, did they explain their condition?

A. There was something about the plant they had in Redwood City, that they had put a lot of money into it and also in accounts receivable, and through this plant they had originally planned to manufacture their own products down there. However, due to some other circumstances, why, they were not manufacturing their own products and therefore it was taking more than what the amount of cash they had on hand to keep in operation. [136]

Q. Mention anything at all about any attachment at that time? A. No.

Q. And was there anything at all said about any other creditors, testified to by Miss Lee?

(Testimony of James R. Norberg.)

Mr. Margolis: We object to the question on the ground it is suggestive and leading, this witness is——

The Court: I don't hear you when you sit.

Mr. Margolis: I beg your pardon, your Honor, I have a sore back. I object to the question, may it please your Honor, on the ground it is leading and suggestive, the witness is one of the defendants in this case.

The Court: Suppose you reframe it.

Q. (By Mr. Berger): You heard Miss Lee testifying a moment ago, did you not, Mr. Norberg?

A. Yes.

Q. And you heard her state, make the statement, did you not, she told you all about these other creditors and that they would have no money to pay the other creditors if she paid you, something to that effect?

A. No, I don't remember anything, of any conversation like that at that time.

Q. Was anything at all said about other creditors at that time? A. No.

Mr. Margolis: I object to the question. [137]

The Court: I will allow the question.

Mr. Margolis: That is suggestive.

The Court: I will allow it.

Mr. Berger: Thank you.

Q. Was there? A. No.

Q. Nothing at all? A. No.

Q. Was there anything at all said about the

(Testimony of James R. Norberg.)

financial condition of the company at that time by Miss Lee?

Mr. Margolis: Object to the question, may it please your Honor——

The Court: You may answer.

Mr. Margolis: On the grounds it has been heretofore answered.

The Court: You may answer.

A. Miss Lee had very little to say due to the fact that she was behind the counter most of the time and most of the conversation was between Mr. Loudolph and myself.

Q. Did Mr. Loudolph make any reference to any financial statement at that time? A. No.

Mr. Margolis: We renew the objection, leading and suggestive.

Q. (By Mr. Berger): Was there anything [138] at all?

The Court: I will allow the question; I will allow the answer.

Mr. Margolis: All right.

Q. (By Mr. Berger): Now, Mr. Norberg, Miss Lee also made a statement to the effect that she had reference to other creditors while she was on the witness stand; did you hear her make that statement?

Mr. Margolis: We object to the question, may it please your Honor, on the grounds it is leading and suggestive.

The Court: I don't think it is leading and suggestive, he asks if he heard Miss Lee make certain

(Testimony of James R. Norberg.)

statements on the stand. I assume he is going to ask whether or not his recollection is that occurred or not.

Mr. Berger: That is all.

The Court: Does it contradict her or corroborate her.

Mr. Berger: That is what I want to find out, your Honor.

Q. Do you remember the question?

A. May I have the question?

Q. I will reframe it. Did you hear Miss Lee make a statement while she was on the witness stand that when you asked her for her payment on your bill, what about the other creditors; was there anything at all said about that by her? A. No.

Q. Was there anything at all said by Mr. Loudolph at that time about other creditors? [139]

A. No.

Q. Did you have any discussion with either Miss Lee or Mr. Loudolph at either of your meetings at that store about any other creditors?

Mr. Margolis: Renew the objection on the same grounds.

The Court: I will allow him to answer.

A. You mean at the store?

Q. (By Mr. Berger): At the store at that time.

A. No.

Q. Now, can you recollect, Mr. Norberg, if there was anything else said at the store at either of those meetings other than what you have just testified to?

A. Well, there was another meeting sometime

(Testimony of James R. Norberg.)

after I filed suit, I mean at the store—you are talking about meetings prior to the suit?

Q. That is right. A. No, nothing else.

Q. Now, when was the next time you saw Mr. Loudolph or Miss Lee?

A. About September 20, around in there.

Q. Around September 20? A. Yes.

Q. And where was that meeting?

A. At Mr. Kolb's office.

Q. And who was present? [140]

A. Miss Lee, Mr. Loudolph, Mr. Kolb and myself.

Q. Can you relate the conversation, what occurred at that time?

A. Miss Lee and Mr. Loudolph were attempting to negotiate with me so that I would lift my attachments that I had levied. And I refused to have the attachments released unless my account were satisfied in full. It is pretty hard to confine my answer to any one meeting.

Q. Well, put it this way: Did you have several meetings right immediately following?

A. Yes, there were approximately three meetings.

Q. How close together?

A. Well, the first one—that is, there were three meetings in Mr. Kolb's office and also another meeting at the store.

Q. How close together?

A. Within a period of two weeks.

Q. Two weeks?

(Testimony of James R. Norberg.)

A. Between two and three weeks.

Q. During those meetings who was present?

A. Miss Lee and Mr. Kolb and myself at one of them and Miss Lee, Mr. Loudolph and myself.

Q. Explain what occurred as best you can in chronological order with reference to the meetings.

A. At the first meeting they certainly tried to get me to lift my attachments and I told them I would only lift them [141] if they could raise the money to pay off in cash. They said they couldn't get the cash, that is why they wanted me to lift the attachments, wanted to borrow some cash which would enable them to pay me in full, wouldn't be able to do it with the attachment on, and then there was something brought up wherein Mr. Loudolph was negotiating with the Reconstruction Finance Corporation trying to borrow money down there, and the reason that he gave for not being successful in obtaining his loan was due to the fact that they didn't feel that they were large enough concern to be borrowing from the R.F.C., they usually dealt in larger volumes of dollars and cents.

Then there was negotiations that they were making, so they told me, and Mr. Kolb, for Samarkand Company to operate the plant, operate out of their plant and somewhere along the line that fell out, so Samarkand was contemplating, very interested in purchasing the Brick O'Gold in its entirety and paying off all liabilities of the corporation. This fell through and at the meeting that Miss Lee was there alone we asked if Miss Lee wouldn't attempt to ne-

(Testimony of James R. Norberg.)

gotiate these things herself because of the fact that Mr. Loudolph was very unreliable about these things. Tried to get together and unable to contact him at times and also at times he wouldn't show up for an appointment, so Miss Lee said she was very interested in it, she showed a lot of interest by always being there, being very conscientious, asked if she wouldn't attempt to negotiate with [142] Smar-kand herself in regard to either their operating the Brick O'Gold or buying them out, and then finally she lost interest in it. Also suggested at one of the meetings that reorganizational bankruptcy be entered into by the corporation. At no time—during the conversations on many occasions the financial statement was referred to and we couldn't understand how a corporation with the amount of assets, compared to the liabilities could allow themselves to get in so low with the cash resources. And the question came up as to whether or not that financial statement was correct or whether they were using it as just a blind to show someone, trying to sucker them in for some money and both stated the financial statement was correct and Miss Lee told me that she had been handling the books for the corporation and she was to receive a salary of—I believe it was \$200 a month. However, she had quit handling the books because of the fact she wasn't getting any money for it and felt she could devote herself to the Lakeside Store to more advantage, financially, to herself and stay down there and not get paid for it.

And getting back to the financial statement, we

(Testimony of James R. Norberg.)

asked if that was correct. They said it was correct and knew it was correct and that they were in a solvent condition, at no time were they in an insolvent condition at all. That is pretty much the story that went on at all of the meetings.

Q. Was this financial statement shown you, this statement I [143] now hold, defendant's exhibit D, produced at any of those meetings you held?

A. Yes.

Q. When and where?

A. Well, it was at all of the meetings.

Q. Did you go over the financial statement at all?

A. Yes.

Q. Do you remember what the discussion was about that financial statement?

A. Well, there was a question that came up here as to the accounts receivable, why they should be that large and the answer was given that the corporation, having put these stores on a franchise basis, they felt they had to work along with them, small operators, in most cases a man and a wife that had taken their life savings to go into a small business venture on their own, didn't want to press. However, left alone they would be able to get us money, not being able to revert the accounts receivable into cash, and take care of their liabilities. And on the due from officers, that question came up and——

Q. What was said at that time about that?

A. Well, I didn't go into it too much with them on the due from officers. However, I was told down

(Testimony of James R. Norberg.)

there that the money was owed by Mr. Loudolph. Now, what it was owed for I didn't find out. [144]

Q. Did any of them ever tell you, either Mr. Loudolph or Miss Lee ever tell you that—withdraw that. Did you ever tell Miss Lee or Mr. Loudolph at anytime that you didn't care if they went into bankruptcy? A. No.

Q. Did any conversation about bankruptcy ever come up at any of those meetings?

A. The idea of the reorganizational bankruptcy came up.

Q. Aside from that?

A. Aside from that, yes, more or less as a——

Q. What was said and when?

A. Might be, you might say a threat, an idea put across that possibly an involuntary petition in bankruptcy would have to be filed if they did not raise the cash.

Q. Who said that?

A. I believe it was myself; I am not sure.

Q. What did they say?

A. No, they didn't want any involuntary petition. Miss Lee said she had taken her life savings, which amounted to approximately \$10,000 put into this business, wanted to have a chance to get it back out.

Q. And did Mr. Loudolph say anything?

A. Mr. Loudolph was against it. He said as the business was not insolvent it would work out, could work out, all they needed was a little time to convert their regular assets into [145] resources, into ready cash.

(Testimony of James R. Norberg.)

Q. Did you have any other conversations with him after that? A. No.

Q. Did he ever tell you anything about being on a C.O.D. basis at any of their meetings?

A. Yes, that was mentioned. They had a deal with Samarkand Company, I don't recall the figure exactly, but I believe they said they were paying 16 cents a gallon more than what they had paid in the past with the understanding that that was to be applied on their old balance with Samarkand.

Q. Did he give you the reason, did he tell you whether or not that was the reason of being on a cash basis, or give you any other reason?

A. He gave no other reason.

Q. Now, the last conversation you had with Mr. Loudolph or Miss Lee was when, Mr. Norberg?

A. Approximately the 30th of September.

Q. Approximately the 30th of September?

A. Approximately that date.

Q. And that which you just related was from the meetings that occurred, at one of those meetings?

A. Yes, what I have said, told you now, consisted of all of the meetings.

Q. And was the statement, defendant's exhibit D, again referred to at that meeting of [146] September 30?

A. Well, it was in and out of all the conversations. I couldn't say for sure whether it was in the September 30 conversation or not.

Q. And how long before September 30, in the meeting just prior to September 30?

(Testimony of James R. Norberg.)

A. About five days apart.

Q. Five days apart? A. Yes.

Q. And would you say that the financial statement was referred to at that meeting five days prior to the last meeting? A. Yes.

Q. It was referred to?

A. Yes, I would say it was.

Q. And anything at that time said about whether or not they were or were not financially embarrassed or insolvent?

A. Well, at all times they were financially embarrassed and they didn't have the cash to pay their liabilities off, but they very much stressed the fact they were not in an insolvent condition.

Q. Was there anything else at any time said to you by anyone with reference to the solvency or insolvency of the Brick O'Gold other than the fact that they were financially unable to meet their bills?

A. No.

Q. Did they give you any other information, did they tell you [147] anything else or show any other evidence of any kind to let you know or to impress upon you the fact that they were insolvent at any time? A. No.

Q. Did they mention to you how to—how much money they had coming to them from some of their accounts receivable?

A. They said it was pretty much in line with their financial statement, the financial statement at that time, the financial condition was pretty much the same as it was at the time of the making of the,

(Testimony of James R. Norberg.)

drawing up of this financial statement dated July 31, due to the fact that they had been on a C.O.D. basis and paid cash for everything, and on the Samarkand bill they had been reducing it by paying more than what they had been paying in the past.

Q. At the time at any of those meetings you had with them did you discuss with them about these accounts receivable as to whether or not they could collect them or couldn't collect them?

A. Yes, that was brought up and they very definitely said they were all collectible.

Q. Did you ask him why they did not proceed to collect the money? And pay off the obligations?

Mr. Margolis: Objection on the ground it is leading and suggestive, your Honor.

The Court: I will allow it. [148]

A. Yes, because of the fact that they did not want to press the store owners, that is the franchise holders, for the amount of the indebtedness they had because in some cases it ran pretty high for the—or they figured for a franchise holder to come up with two or three thousand dollars in cash and pay them right away.

Q. Do you remember a meeting at one time held in Mr. Kolb's office when Mr. Loudolph was there and as you heard Mr. Loudolph testify this morning that a statement was made to the—by Mr. Kolb to the effect that according to that financial statement he could get 75 cents on the dollar. Do you remember anything like that being said? A. No.

(Testimony of James R. Norberg.)

Q. Was there anything said like that at any time? A. Not to my knowledge.

Q. When was the first time you had knowledge of the bankruptcy, Mr. Norberg?

A. In January, 1950.

Q. January, 1950? A. Yes.

Mr. Berger: I think that is all, your Honor.

The Court: Each time during practically all these negotiations, Mr. Loudolph and Miss Lee were featuring this financial statement?

The Witness: That is correct. [149]

The Court: And were relying on it and said they had a lot of money owing them under these franchise stores?

The Witness: Yes, sir.

The Court: Well, you were not satisfied with the financial statement?

The Witness: Well, I wouldn't say that. I wasn't satisfied with it because I had no chance or any reason to go against the financial statement. I had not investigated as to how much money was held, you see, your Honor.

The Court: You knew——

The Witness: I filed suit.

The Court: You knew the status of the franchise stores, didn't you? They were small retail stores?

The Witness: This came up after my attachments, your Honor. You see, when I filed suit on September 12, I also had a writ of attachment on all these places. At that time I didn't know anything, didn't know whether the Brick O'Gold on

(Testimony of James R. Norberg.)

Chestnut street was owned by John Dokes, Brick O'Gold or anything about it. I learned all this information afterwards.

The Court: When they showed you this financial statement, you didn't go behind it to find out who were the people that owed the money?

The Witness: No, I only had that information in the form of writs from the Sheriff's office.

The Court: And it was owed by these franchise stores? [150]

The Witness: Yes, sir.

The Court: And you knew they couldn't be collected from in full, didn't you?

The Witness: I knew quite to the contrary, because I had seen some of these franchise holders pay off. Writs issued from the Sheriff's office shows these people owed so much money. You see, I was paid off from one store alone, this fellow paid me in full on what he owed, so as to whether or not the other franchise holders were in a position to do that, I don't know.

The Court: Well, while you were paid off in full you realized at the——

A. I don't know what disposition was made, I don't know anything about the bankruptcy.

The Court: Cross-examination.

Cross-Examination

By Mr. Margolis:

Q. You stated in answer to the last statement that the first you knew of the bankruptcy, was in

(Testimony of James R. Norberg.)

January, 1950, that is correct? I think you just made that statement? A. Yes, that is correct.

Q. Now, I will direct your attention to this suit card, which was sent over from the referee's office and ask you what the blue card is.

A. What the blue card is?

Q. Yes, a portion of your permanent [151] record? A. Yes, that is correct.

Q. Now, directing your attention—withdraw that. The dates, I assume, start from 9/12/49, as is indicated on the front of the card?

A. That was the date the suit was filed, yes.

Q. That was a typewritten date. Now, the dates which are in longhand writing on the reverse of that card, does that refer to 1949?

A. 1949 and 1950, yes.

Q. The information thereon contained is put there by—under your supervision and instruction and direction? A. That is correct.

Q. I call your particular attention to the language opposite the date 10/21, that is 1949?

A. Yes.

Q. And ask you to read everything after that date, please. A. Everything after that date?

Q. That is that line.

A. Pertaining to that date?

Q. Pertaining to that date, yes.

A. "Received full amount from Sheriff. Client doesn't want dollars until time for bankruptcy has passed. Pay dollars at end of December business."

Mr. Margolis: We will offer this in evidence,

(Testimony of James R. Norberg.)

may it please your Honor, and ask it be appropriately marked next in evidence. [152]

The Clerk: Plaintiff's exhibit 6 admitted and filed in evidence.

(Whereupon the document entitled "Suit Card," marked plaintiff's exhibit 6, was admitted in evidence.)

Mr. Margolis: You have told us that your first visit to the premises out at Lakeside was in September, September 9, September 8, I should say.

A. September 9.

Q. That was Admission Day, a holiday, is that correct? A. It was a Friday.

Q. A Friday?

A. I don't know whether it was Admission Day or not.

Q. And according to your record which I have just read, suit was filed on September 12, Monday following? A. Yes.

Q. And attachments levied and the full amount collected, is that correct? A. Yes.

Q. Now, you told us also that on September 20, 1949, you had this conversation in Mr. Kolb's office at which time there was present Mr. Kolb, yourself, Miss Lee, and Mr. Loudolph, is that correct?

A. I said approximately September 20, yes.

Q. Was it September 20 or some other day, do you know?

A. It may have been the 19th, the 20th or 21st, within those— [153] very close to the 20th.

(Testimony of James R. Norberg.)

Q. And at that time in your presence and in the presence of Mr. Kolb, Mr. Loudolph and Miss Lee pleaded with you to withdraw the attachment, is that right? A. That's correct.

Q. You told them you would only lift it if the account was satisfied in full?

A. That is correct.

Q. Now, Mr. Kolb heard that conversation also, did he not?

A. Yes, I believe he did. Now, Mr. Kolb was oftentimes in and out of the office.

Q. And you heard him testify that he made a number of levies on September 22, 1949; you heard that testimony this morning, did you not?

A. Yes.

Q. Now, you mentioned something about a reorganization in bankruptcy, some statement was made at that meeting of a possible reorganization in bankruptcy, is that correct, was such a statement made?

A. Yes.

Q. Isn't it a fact, that Mr. Loudolph informed you and Mr. Kolb, present at the time Miss Lee, that he was advised by his attorney to file a voluntary petition in bankruptcy?

A. May I answer that by going into it a little bit?

The Court: Yes, answer it fully. [154]

A. Mr. Loudolph, I believe, is not telling the truth on that.

The Court: He doesn't want your belief.

The Witness: Well, because of the fact that Mr.

(Testimony of James R. Norberg.)

Loudolph was very definite against bankruptcy, for one thing, and number two——

Mr. Berger: I move that——

A. (Continuing): Mr. Gay——

The Court: No matter what you think—listen to me. I don't want to know what you think. I want to know what was said and done. You can answer fully that way, but I don't care for your opinion.

The Witness: Yes, sir. I say Mr. Loudolph did not say any such thing.

Q. All right. You mentioned a moment ago then, that it was suggested that an involuntary petition in bankruptcy be filed if the cash would not be put up in payment of his bill in full, is that correct?

The Court: Where are you going?

Mr. Berger: Looking at the reporter's notes. I see it, page 101.

Q. (By Mr. Margolis): Did you so testify? You have testified that an involuntary petition in bankruptcy would be filed if the cash to pay the settlement of your claim in full was not put up at [155] once? A. I said that was mentioned.

Q. And that Miss Lee said that if that were done she would lose all her savings. You just told us that?

A. That is right.

Q. Now, what was the basis of the proposed involuntary petition in bankruptcy? What act of bankruptcy was to be relied upon for the filing of such petition?

A. Well, I am not an attorney myself and I am not familiar with the bankruptcy act, Mr. Margolis.

(Testimony of James R. Norberg.)

However, there was some reason, what it was that was given I do not know, but there was some reason given why or maybe a reason was not given. I don't know.

Q. Was this threatened?

A. Probably more or less a threat. I would say yes it was a threat because of the fact that their financial condition showed them far in excess of their liabilities on the asset side.

Q. You heard Mr. Kolb say he knew nothing about bankruptcy?

A. Mr. Kolb is not my attorney.

Q. You were there and listened to the conversation and you heard him make that statement here today?

A. Yes.

Q. And you're telling this court that involuntary petition in bankruptcy would be filed on the ground that the assets far exceeded the liabilities? [156]

Mr. Berger: Just a moment, if your Honor please, I move, I object to that as, that is not a——

The Court: I don't think he said that.

Mr. Berger: No.

Mr. Margolis: Well, what basis was going to be used, what act was going to be used for the filing of the involuntary petition?

Mr. Berger: I think it has been asked and answered twice, your Honor.

The Court: Well, I don't think he has answered it.

(Testimony of James R. Norberg.)

Mr. Berger: Okay.

A. Well, not to be pert or anything like that, Mr. Margolis, but chances are if an involuntary petition would be filed I would probably come to see a bankruptcy attorney to see if anything could be done about filing an involuntary petition.

Q. Do you know of any act that was performed at or about the time you speak of which would be the basis for the filing of an involuntary petition?

A. Well, at that time I did know about the attachment that had been levied by the accountant——

Q. You did know the Trumbull attachment?

A. I have heard something about it, yes.

Q. And you did also know that Mr. Kolb had filed a suit and attachment too, didn't you?

A. No. [157]

Mr. Berger: That isn't the evidence, that isn't in the issues, first of all.

The Court: He asked whether he had or had not.

A. No, I knew to the contrary.

Q. (By Mr. Margolis): You didn't discuss the matter of Mr. Kolb's claim with him at all?

A. That isn't what you asked me.

Q. All right, I will ask you. When did you first find out that Mr. Kolb represented a creditor of the Brick O'Gold corporation?

A. Approximately September 15, be around September 15.

Q. Two or three days, two days after your attachment?

A. That is about right.

(Testimony of James R. Norberg.)

Q. Yes, and you knew, did you, that Mr. Kolb had filed a suit and attachment?

A. No, quite to the contrary.

Q. What did you know?

A. I knew Mr. Kolb had filed suit.

Q. How do you know that?

A. We received the information from the Central Bureau, Central Credit Reporting Bureau.

Q. You get information of that kind from a Bureau from time to time, don't you? A. Yes.

Q. Did you have to make inquiry for that or is that just [158] sent out as a matter of course?

A. That comes to us as, we list as an account for collection that an account that has been listed with us for collection.

Q. What do you do, you list that account with this agency?

A. Well, what it is, it is more or less a clearing house.

Q. I see.

A. That is owned by several of the agencies and as an account, for instance, when an account comes into my office for collection we list that claim with this Bureau.

Q. Immediately that you receive it?

A. What is that?

Q. Immediately that you receive the account?

A. In the same day.

Q. Did you do that in this case?

A. Well, I don't know for sure if that went in. As I say, the claim came in on Friday.

Q. Yes.

(Testimony of James R. Norberg.)

A. Whether it went on Friday or Monday—sometimes the Bureaus wait until they have enough, maybe a week, before sending it on in.

Q. What was done in this case?

A. I do not know.

Q. Your records show? A. No.

Q. You say that in the ordinary course from this agency you [159] got this three days after the attachment was filed that Mr. Kolb's client had filed suit?

A. Well, maybe I misunderstood you. What I mean we would receive information about three days after that information goes down from our office, presuming that it went down on Friday, the 9th of September, we would have it back approximately——

Q. Monday, Tuesday?

A. About Tuesday or Wednesday, so I say three or four days.

Q. Have you got anything in your file at all to show what you received from this credit agency?

A. Yes. Do you have my blue card?

Mr. Berger: Your Honor, I purposely didn't object, for the purpose of saving time, and I also thought that it may lead up to something. I really think this is going very far afield and certainly incompetent.

The Court: It is cross-examination.

The Witness: Here is the card.

Mr. Berger: Of course, nothing on direct exam-

(Testimony of James R. Norberg.)

ination upon which a cross can be based, your Honor.

The Witness: You see, this card we fill it out where it is typed in black, that is from our machine, and then when it comes back, filled out like that. (Indicating.)

Q. (By Mr. Margolis): The Witness is referring to the back card which is attached to this exhibit marked plaintiff's exhibit 6.

Q. Now, can you read into the record what these hieroglyphics mean? [160] A. Yes.

Q. You say the top of the card shows "Brick O'Gold, 926 Broadway, Redwood City." And then your bureau recorded—what does that mean, you recorded with the bureau the amount of your claim?

A. No, that is just a bureau record that is printed on the card. That is just like you might put down Max H. Margolis, law office, on your stationery, they put bureau record.

Q. I know that, but I want to know about bureau record, what does that refer to?

A. I see what you mean. Right here, look over here, it is stapled, there is a number, number 21. That is my office number, we have an amount—That is our number, the amount \$1029, filed 9-49.

Q. I see. And then you get this information about other litigation and other suits and other pending matters back there, you affix it on that card there and send it back?

A. They send that back to us, that card came back to us.

(Testimony of James R. Norberg.)

Q. It shows something about a suit for materials for \$1401. That is the matter testified to by Mr. Kolb?

A. May I see it?

Q. I will ask you the questions in order to speed it up.

Mr. Berger: Let him explain the whole card.

Mr. Margolis: Go ahead.

A. It shows up: "Brick O'Gold Corporation, Municipal Court— [161]

"M" stands for Municipal Court—"256298, filed 8/2/49, for services materials, \$1401—Sullivan, Roche, Johnson and Farragher" the attorneys representing the plaintiff in this action and underneath it has "M" which is Municipal Court, "256633, 8/8/49, which is the filing date, for rent \$1200."

Q. August 8, 1949? A. Yes.

Q. Suit filed for rent, \$1200?

A. Yes, that is filed by Young, Hudson and Rabinowitz. Another filed on 26th of August, number 257536 for money, \$334.00, filed by Colvin and Tyler, Attorneys at law.

Q. And on top of these you had information with respect to the Trumbull suit, the accountant filed a suit and attachment?

A. Which we thought was strictly no good, nothing for us to be concerned about.

Q. Yes, but the conversation to which Mr. Kolb testified this morning was that during this conference in September at his office a discussion was had and you were advised about the Trumbull suit and attachment which tied them up, you were advised of

(Testimony of James R. Norberg.)

that, were you not?

A. Yes. Might I state, Mr. Margolis, the reason I wasn't alarmed about that is because of the fact that I could show you cards in our office that has ten times the amount of actions filed where people are not in a bad condition at all, that is, they just [162] don't pay their bills.

Q. We have the Court for that. You also received from that bill one of those records that a suit was brought against the Brick O'Gold in the sum of \$352 on 9/20/49, Municipal Court action number 258490?

A. Yes.

Q. And that is attached to the exhibit about which we are talking about, plaintiff's exhibit number 6, and you also received from that bureau information with respect to an unlawful detainer action in the amount of \$1029, also 9/1949—September, 1949?

A. I beg your pardon, that is October 11, Mr. Margolis.

Q. Perhaps I am wrong.

A. 10-11. This shows that I filed my claim number 21. This is the other information they gave me to refresh my memory from my files.

Q. Very well. And Miss Lee, you say, told you at that conference if bankruptcy proceedings did intervene she would lose whatever she had invested in this Brick O'Gold corporation, didn't she?

A. Yes.

Q. You're positive that when you appeared at the Lakeside premises of the Brick O'Gold you were

(Testimony of James R. Norberg.)

told by Miss Lee if you would appear the next morning this bill of yours would be paid in full?

A. That is correct. [163]

Mr. Margolis: I have no further questions, your Honor.

The Court: Any redirect?

Mr. Berger: I did want to proceed, your Honor. Should we come back?

The Court: If it will take some time, if it is a matter of a few minutes I will close it up. You have other testimony?

Mr. Berger: I have no other testimony other than Mr. Norberg.

The Court: If it is to be of some length I expect we better go to morning.

Mr. Berger: I don't know, maybe only a few questions. I really don't know, your Honor.

The Court: Off the record.

(Off the record discussion.)

The Court: We can't close the case this afternoon anyway.

Mr. Berger: That is right.

The Court: We will adjourn until ten o'clock tomorrow morning.

(Thereupon an adjournment was taken until August 2, 1950, at 10:00 o'clock a.m.) [164]

Wednesday, August 2, 1950, at 10:00 A.M.

The Court You may proceed, gentlemen.

Mr. Berger: At the conclusion of the hearing yesterday I don't remember if I had completed or not completed my direct. I think Mr. Margolis was cross-examining and I wanted to ask him some more questions if I may, with your Honor's permission; and may I also, with your Honor's permission, go into some of the matters a little more fully to sort of clarify some of the matters that went on at direct examination.

The Court: You may.

JAMES NORBERG,

previously sworn, resumed the stand and testified as follows:

Redirect Examination

By Mr. Berger:

Q. Mr. Norberg, I show you plaintiff's Exhibit 6 which is a blue card attached to a white card, and has another sort of brown card attached and two slips of paper. Now, will you please explain to me, rather, refer to the blue card and under the writing on the back of the blue card dated October——

The Court: That is Exhibit D you are referring to?

Mr. Berger: No, it is plaintiff's Exhibit 6, your Honor. Under the date of October 21st, 1949, I presume it is, will [165] you read that, please?

A. "Received full amount from sheriff. Client

(Testimony of James R. Norberg.)

doesn't want dollars until time for bankruptcy has passed. Pay dollars end of December business."

Q. I see. Now, when did you receive the money on that? A. On October 20th.

Q. October 20th. And the next day you called your client, is that right? A. That is correct.

Q. Now, will you explain or tell me why you had any reference to bankruptcy in October on your card? Did you tell your client that about bankruptcy?

Mr. Margolis: We object to the question, your Honor, on the ground——

The Court: I will allow him to explain his own answer.

A. The reason for an entry such as this is that on accounts of this size oftentimes bankruptcy steps into the picture, and the remittance must be made to the trustee, and rather than remit the money to our client and then have to go back to them and tell them that we have to put the money back into the trustee's hands, sometimes they will ask us to keep the money in our possession until the time for bankruptcy has passed in order that they need not enter it in their books and then take it off again by sending us back a check.

Q. And is that the general or usual custom or practice in your [166] business? A. Yes.

Q. You do that with all your large accounts, do you? A. Yes.

Q. Now, when did you send the money to your client? A. On October 31st.

(Testimony of James R. Norberg.)

Q. And when did you first receive knowledge of the bankruptcy? A. In January of 1950.

Q. Now, what is the next card attached to that, Mr. Norberg?

A. The next card is the white master work card that is made up when the account comes into our office.

Q. When did the account come into your office?

A. September 9th, 1949.

Q. That is the same day you already testified to you saw Mrs. Lee, if I remember right?

A. That is correct.

Q. Did you make any notations on the back of that card as to what transpired when you saw Mrs. Lee? A. No.

Q. When did you—what does the next card mean?

A. The next card is a card supplied us by the Central Credit Reporting Bureau.

Q. When did you get that card?

A. That card is made up in our office giving the name of the debtor concerned, her address, our code number of our office [167] with the Bureau, the amount of the claim and the month that the claim was filed with our office.

Q. Then what do you do with that?

A. That card is then mailed to the Central Credit Reporting Bureau.

Q. How long after you received the account was that mailed to the Central Bureau, do you remember, or have you any record of it there?

(Testimony of James R. Norberg.)

A. I have no record of it there. It is the common practice and instructions to the employees is that they are to go out the same day as an account comes in.

Q. Do you know if that went out the same day?

A. No, I don't.

Q. Then what happens after the card is sent out?

A. As soon as this card is received at the Central Credit Reporting Bureau they take all information they have pertaining to the debtor concerned and type it on the card and send the card back to us.

Q. What does that card show?

A. You mean the information they supply us?

Q. Yes.

A. It shows Ludolf, Paul, President. It shows the corrected address of 827 Broadway, Redwood City. It also shows Brick O'Gold Corporation, a suit filed in Municipal Court on 8-2-49 for services and materials for \$1,401.00, Sullivan, Roche, [168] Johnson and Farragher, attorneys. Another suit filed in the Municipal Court on 8-8-49 for rent, \$1,200.00, Young, Hudson and Rabinowitz, the attorneys. Another suit filed on 8-26-49 for moneys, \$334.00, Colvin and Tyler, attorneys. It also shows another member of the Bureau as having a \$544.04 claim listed with them in July of 1949 and cancelled in August of '49.

Q. When did you receive that card from the Bureau? A. I don't know the exact date.

Q. Roughly, as far as you can remember?

A. These cards always come back to us within a

(Testimony of James R. Norberg.)

maximum of four days from the time that they are received at the Bureau.

Q. Then would you say—withdraw that. Did you get that card before or after the attachment was levied? A. After.

Q. Are you sure about that?

A. I am positive of that.

Q. About how long after the attachment was levied, would you know roughly?

A. I would say three days, four days.

Q. Three days after the attachment was levied?

A. Yes.

Q. What does the next card show?

A. The next card is a flasher that comes in from the Bureau showing for our reference to our files that we have the claim [169] against Brick O'Gold at 926 Broadway in Redwood City for \$1,029.00 listed in September 6th, 1949. They show another suit filed on September 20th of 1949 in the Municipal Court for services, \$352.00, R. L. Isaacs, attorney.

Q. September 20th? A. Yes.

Q. When did you get that flasher back, do you know roughly?

A. Well, approximately September 27th to 30th. Between seven and ten days after the action is filed because this information is obtained from the Edwards Abstract.

Q. Then what is the next attached card?

A. The next one has the same reference to our claim of \$1,029.00 showing a suit against Brick

(Testimony of James R. Norberg.)

O'Gold in Municipal Court on 10-11-49, unlawful detainer, Piccirillo and Wolf, attorneys.

Q. Now, at the time, then, Mr. Norberg—I will withdraw that. Now, you stated that you first saw Mrs. Lee on September 9th, that is the same day you received the account? A. That is correct.

Q. And you also testified that you went there and asked her for a check for over \$1,000.00, isn't that right? A. That is correct.

Q. How much was it exactly, do you remember?

A. \$1,029.00.

Q. And what did she tell you at that time? [170]

A. She told me to come back the next day, that the checks were in the plant in Redwood City. She didn't have that kind of cash, she would get a check for me if I would pick it up the next day.

Q. Anything else said as to the financial condition or inability to pay? A. Nothing.

Q. At that time? A. Nothing.

Q. Did she say anything at all about any other creditors at that time? A. Nothing.

Q. Anything about financial statements at that time? A. No.

Q. How long did you talk to her then, roughly?

A. I would say five or ten minutes.

Q. That is the time you were there with another man from your office you have testified to?

A. Yes.

Q. Then the next day you went back, is that correct? A. Yes.

Q. And who was there at that time?

(Testimony of James R. Norberg.)

A. Mr. Ludolf, Miss Lee and myself.

Q. And what date was that?

A. That was on September 10th. [171]

Q. September 10th. Now, what was the conversation at that time?

A. I told her that I dropped in to pick up the check. They told me they didn't have the money. I told them that wasn't my understanding, that I was to pick up a check that date. Mr. Loudolph said that he had an appointment either that afternoon or that evening, sometime over the week end with some other gentleman who was putting in approximately five or ten thousand dollars cash into the business, and that he would have a check for me by Monday. I told him that if I didn't have a check by Monday I was filing suit and attaching. I did not intend to come back or telephone, the check must be in my office by nine o'clock Monday morning.

Q. What did they tell you?

A. He told me the check would be there.

Q. Did he say anything at all about his then financial condition at that time and on that date?

A. Nothing.

Q. Did he say anything at all about any other creditors at that time and on that date?

A. No.

Q. Or about any other suits pending against him?

A. Excuse me, there was one thing that he did mention that I recall now. He couldn't understand why KJBS had turned this account over to me be-

(Testimony of James R. Norberg.)

cause of the fact that he had told KJBS that [172] the account would be taken care of, that they had nothing to worry about, and he couldn't see why for the amount of money they had spent with KJBS they should turn it over to a collection agency. I told him that was no affair of mine, I was merely acting as agent for KJBS to pick up the money.

Q. Now, did you tell him why you were going to attach?

A. I gave no reason for attaching, no. I just told him that if the money wasn't in I was going to attach.

Q. Did you have any reason to attach, Mr. Norberg, instead of waiting for the money?

A. Well, that is the customary practice. When we don't receive payment on an account we get a million promises that are not fulfilled and in order to get the money to expedite matters if we know where there are assets, well there is an attachment.

Q. Did he tell you where some of the assets were?

A. No, we found them on our own.

Q. When was the first time, the very first time that you ever heard about a financial statement from either Miss Lee or Mr. Loudolph or Mr. Kolb?

A. In Kolb's office.

Q. When was that, for the very first time, if you can remember? Let's put it this way. How long after the attachment? A. Around seven days.

Q. Around seven days? [173]

A. Maybe two days either way, maybe five days or nine days; around seven days.

(Testimony of James R. Norberg.)

Q. And what was the reason and can you give me the purpose or reason of why you happened to hear about a financial statement and talk to anyone about that financial statement?

A. I had been asked by Mr. Kolb to come down to the office, that Mr. Loudolph and Miss Lee were going to be there, and when I came down they told me that I had nothing to worry about.

Q. Who told you?

A. Mr. Loudolph and Miss Lee; we had nothing to worry about, that it was just a matter that they didn't have the amount of cash to pay the account off. They were able to prove this by a financial statement which Mr. Kolb had down there that was supplied to him, and they showed me the financial statement showing that everything was all right as far as their business was concerned.

Q. And that was about, you would say around seven, eight, nine days, somewheres around there, after the attachment?

A. After the attachment, that is correct.

Q. Did you question them about the financial statement at that time, that very first time you were there? A. No.

Q. Was anything discussed about the statement other than what you have just testified to as far as you can remember?

A. Well, I don't know when these questions came up and at what [174] meetings regarding certain items on the financial statement such as the moneys due by officers was one item. Now, whether that was

(Testimony of James R. Norberg.)

brought up at that meeting or at a subsequent meeting I am not sure, and also in regards to the amount of the accounts receivable.

Q. Now, will you tell me why you attended those meetings, Mr. Norberg, inasmuch as you had the money under attachment as you said in your suit?

A. Well, I went down there hoping that something could be worked out where I could get a check immediately without having to wait for the time to pass within which to take my judgment, Miss Lee having been served on the morning of the 12th I would have to wait until the 22nd to take my judgment and then get an execution, follow through the regular course of the courts and have the sheriff pick up the money which may take anywhere up to thirty days before I would get my money, and the possibility that I could get the money down there and then release my attachment.

Q. Did you have any reason to believe that you would or would not get your money at that time when you went there?

A. I didn't know if I would get it or not. It was just a shot in the dark when I went down there to hope that I would get it.

Q. Did you have any reason to believe that you would get it?

A. I had no reason to believe I wouldn't get it, no.

Q. When you first saw the financial statement, and when we say [175] "financial statement" for the record we refer to defendant's Exhibit D, Mr.

(Testimony of James R. Norberg.)

Loudolph did most of the talking, did he, with reference to this statement?

A. No, Mr. Loudolph didn't.

Q. Who did?

A. I believe it was Mr. Kolb and myself. Mr. Loudolph was merely answering questions to the best of his ability while we were there.

Q. Did you have any reason to disbelieve or to believe that statement?

A. At a later meeting I was——

Q. I mean at the very first meeting?

A. At the very first meeting?

Q. Yes. A. No.

Q. What?

A. I had no reason to believe it or disbelieve it, either one.

Q. Did he try to impress upon you—withdraw that. Did he in any way emphasize his status, his financial status? By "he" I mean Mr. Loudolph, emphasize his financial status with reference to the statement at that very first meeting?

A. Yes, he said——

Q. What did he say?

A. He said the statement was correct because at that time he was negotiating with the bank and also at that time he was [176] negotiating with the bank for a loan and that this financial statement was being used and therefore it was correct.

Q. Did you believe him then?

A. Yes, I believed him.

Q. Did you ask him for any check when you

(Testimony of James R. Norberg.)

were there for your money, which was the reason of why you went there?

A. No, he told me that they still hadn't been able to raise the cash.

Q. I see. Did you ask him when he would?

A. Well, I don't know as I asked him because it was brought out that Mr. Loudolph was still negotiating with this party or other parties. In the meantime, he was trying to arrange with other parties to invest money in the corporation down there.

Q. And did he say anything at all as to when you would get the cash? A. No.

Mr. Berger: That is all.

Recross-Examination

By Mr. Margolis:

Q. Mr. Norberg, this agency from whom you get the information that is attached to plaintiff's Exhibit No. 6 was located here in San Francisco?

A. Yes.

Q. And from time to time is it not a fact that information is secured over the telephone? I mean, you could call up and they could give you the information almost at once by your [177] giving the operator what is known as your "call number"?

A. Yes, that is possible.

Q. And frequently when you have cases requiring collections of \$1,000.00 or more and you want to proceed with haste, you make your inquiry by telephone? A. No.

Q. You do not? A. No.

(Testimony of James R. Norberg.)

Q. It was possible for you to get such information by telephone?

A. It is possible, but we do not usually practice it.

Q. Now, I think you told us that the last item attached to this Exhibit 6 showed information of receipt for services—suit for services commenced on September 20th, 1949, for \$352.00, and you also told us that you believed you got that information not later than September 27th or 30th?

A. That is correct.

Q. Now, between September 27th and September 30th you already knew, did you not, of this suit for the \$352.00 for services against the Brick O'Gold Corporation?

A. May I answer that in this way, Mr. Margolis?

Q. Will you answer the question first and make any explanation you wish? I am not going to hamper you in that respect. I will withdraw my question and ask it again. You told us that appended to that plaintiff's Exhibit No. 6 was a [178] paper with information that a suit was commenced against the Brick O'Gold Corporation for \$352.00 for services, and the suit was commenced according to my notes on September 20, 1949, and that in the ordinary course of business inquiry as made by you of that agency who would get you that information between September 27th and September 30th, you so testified a moment ago, is that correct?

A. Yes.

Q. And between September 27th and September

(Testimony of James R. Norberg.)

30th you did receive the information with respect to this suit, is that correct?

A. That is a presumption.

Q. A presumption? A. Yes.

Q. At that time did you already have the information which is attached to that exhibit that a suit on 8-2-49 for services had already been commenced?

A. Yes.

Q. Against the bankrupt corporation?

A. Yes.

Q. And you also had the information that on August 8th, 1949, a suit had been commenced for rent against the bankrupt corporation, is that a fact? A. Yes.

Q. And you also had the information that on 8-26-49 a suit [179] had been brought for the sum of \$334.00 against the corporation?

Mr. Berger: Just one moment, if I may. If your Honor please, I don't know what point of time counsel is referring to. I must assume for the sake of the questions that that was between September 27th and 30th. Is that what he is driving at? I can't quite follow the question.

The Court: Well, he asked the witness whether he had that information prior to September 27th.

Mr. Berger: That is what I wanted to know, if he had the information prior to September; if so, when?

Mr. Margolis: That is right.

The Court: You may pursue that a little further.

(Testimony of James R. Norberg.)

Q. (By Mr. Margolis): Well, suppose I go back and clarify it, your Honor.

The Court: You may ask him when he got that information.

Q. (By Mr. Margolis): Can you tell us when you got the information with respect to the suit which was commenced according to what you yourself read from plaintiff's Exhibit 6 on 8-2-49? I say 8-2-49 because that is the date on which he gave it to you.

A. This information would be about the 20th—wait a minute, excuse me, it would be approximately the 15th of September or the 16th of September, something like that.

Q. Now, in what amount was that, Mr. [180] Norberg? In what amount does the document state there the amount of that suit?

A. Well, there are all three suits on this?

Q. Well, I am asking you about the one of 8-2-49? A. \$1,401.00.

Q. Now, the suit for rent commenced 8-8-49 as you gave it to us? A. Yes.

Q. The information was received by you when?

A. This information was all received on one card.

Q. Then it would be between September 15th and 16th?

A. Yes, possibly September 15th or 16th.

Q. Was there an amount?

A. Yes, \$1,200.00.

Q. \$1,200.00? A. Yes.

Q. Was that an unlawful detainer action, you

(Testimony of James R. Norberg.)

sought recovery of the premises?

A. No, just rent. It may have been an unlawful detainer action; however, the abbreviation she puts in here is rent.

Q. The one on 8-26-49 was for what?

A. \$334.00.

Q. What was the nature of the action?

A. Money.

Q. Now then, if I understand you, that these three items which [181] we have just read off, you got the information between September 15th and 16th, and that thereafter between September 27th and September 30th you were apprised of an additional suit commenced on September 20th for services in the sum of \$352.00, is that correct?

A. Do you mean I as an individual was apprised of it?

Q. Your office.

A. Well, that is what I tried to explain to you awhile ago, Mr. Margolis, if I can make the explanation now. I don't see all of these things as they come in. That has been one big bone of contention in my office, that we pay for this information and do not use it. Now, it sounds rather silly I will admit, but, however, these things come in and I may not see them for a month, and some of them I never see. They may be attached to the card, I may have seen it, I don't know, so I am not going to answer the question yes or no because I do not know.

Q. The card reveals, however, that a writ of

(Testimony of James R. Norberg.)

execution was levied on October 5th, 1949, does it not? A. No.

Q. Does your file reveal this?

A. An execution on October 5th.

Q. I get my information from a letter received from Mr. McGrath, the sheriff of San Mateo County, in answer to an inquiry made for the [182] particulars.

A. Well, there is no entry on my card from September 22nd until October 7th.

Q. Well, your attorney stipulated that the facts in that portion of the paragraph were true and correct, that an execution was levied on October 5th, 1949, is there any question about it?

A. Is that the date that the execution is dated?

Mr. Berger: If your Honor please, I have an execution dated October 5th, but it doesn't show the date of levy.

Mr. Margolis: May I read this to you, and you can correct it: "October 5, 1949. J. R. Norberg, et al., vs. Brick O'Gold, Inc., San Francisco Municipal Court, 258127, Execution in which five garnishments were made as follows, and then the sheriff——

The Witness: May I see it?

Mr. Margolis: Yes, you certainly may, and if you want to see a copy of my letter of inquiry I would be glad to show you that.

The Witness: Well, I don't know anything about this letter.

Mr. Berger: Let me see it, Max.

(Testimony of James R. Norberg.)

Mr. Margolis: Well, perhaps I can approach it, your Honor, this way. I will not labor that point. There is an allegation that an attachment was made on the 12th or 13th of September and execution levied on the 5th. Now, if there is a [183] day or two difference in it I do not think it is material. The purpose of the recross-examination is to demonstrate to the Court what the defendant knew or had reason to know on the date the execution was levied, he having demonstrated by his own records and information what he knew.

Mr. Berger: Just a moment. I will object to a statement to that effect because that is not the fact. The facts are as to what he knew or had reason to know September 12th, the date of the attachment, not October. September 12th is the governing date, your Honor.

Mr. Margolis: It is more than four months had elapsed between the attachment and the filing of the petition, your Honor. I think we wouldn't be here, I would concede in this Court or in any Court that if the line of the attachment had ripened into a valid lien which we couldn't attack in a proceeding of this kind. But in view of the fact that the attachment and the execution both are within a four month period, it is my contention that the knowledge even before the execution is very, very important, and I have a case on the situation, if your Honor desires I will submit it later.

The Court: You know, I think that knowledge——

(Testimony of James R. Norberg.)

Mr. Berger: Must be, your Honor, on September 12th.

The Court: I realize that that is technically correct, but a knowledge that he had afterwards may reflect his state of mind earlier. [184]

Mr. Berger: They will have to prove the state of mind was his state of mind on September 12th.

The Court: That is true, but knowledge that he acquired afterwards may reflect somewhat on that.

Mr. Margolis: Taking all the circumstances together, your Honor.

The Court: Just as I have heard a lot of testimony relative to his conferences along late in September and October, et cetera. I think they are pertinent as showing his state of mind.

Mr. Berger: That is true, except the only conference he had prior to the attachment was on the 9th of September because the attachment went on two days later. Those are the important points, but as I said, we are not arguing the case yet, your Honor.

The Court: Further cross-examination.

Mr. Margolis: I want to look at this card one moment, your Honor, and I may be through or I may have another question. I have no further questions, your Honor.

Mr. Berger: No further questions, your Honor.

The Court: You may go down. Any further testimony?

Mr. Margolis: I would like to introduce a short rebuttal testimony, your Honor, by one witness.

(Testimony of James R. Norberg.)

The Court: You have a right to that.

Mr. Margolis: I will call Miss Lee, your [185] Honor.

MISS LEE

previously sworn, resumed the stand and testified as follows:

Redirect Examination

By Mr. Margolis:

Q. Miss Lee, you sat in the Courtroom and heard Mr. Norberg both yesterday and this morning tell the Court that when he appeared at the premises out there at Lakeside in connection with this claim you told him to come back the next morning and you would have a check for him in full. You heard that testimony? A. Yes.

Q. Did you tell him anything of that kind?

A. No, I did not tell him anything of the kind. May I explain it, your Honor?

The Court: You may explain.

The Witness: Because we did not have that money and it would be impossible to get that money overnight, and in fact I told Mr. Norberg that we were in such critical condition that we even owed wages, that if we had the money we would certainly take care of our wages instead of being in the situation we were in.

Q. You told him that when he called on the 9th of September?

A. The first day when he came in he did ask

(Testimony of Nellie Lee.)

quite a number of questions about the condition of the company because when he [186] asked us for the check and I said we could not pay him, we really did not have the funds, and I explained to him the situation of the company.

Q. Did you participate—I will withdraw that. You heard Mr. Norberg testify that the next day when he returned that both you and Mr. Loudolph told him that there was nothing to worry about. Did you participate in that conference the next day or were you engaged elsewhere about the premises?

A. On the first day Mr. Norberg and I spoke at length, and it was concerning—he asked about the assets of the company and also about the accounts receivable and what they amounted to and which of the stores had accumulated the accounts receivable. On the second day I did not participate in the conversation.

Mr. Margolis: That is all.

Mr. Berger: Just a moment, please.

Recross-Examination

By Mr. Berger:

Q. You had never seen Mr. Norberg at any time prior to that September 9th when he came into your store, isn't that correct?

A. As far as my memory is, I do not believe I had ever seen him. That was the first time.

Q. First time you ever met him was when he came into your store September 9th?

A. Yes. [187]

(Testimony of Nellie Lee.)

Q. And he came in alone or with someone else, do you remember?

A. I only talked with Mr. Norberg. If he came with someone I do not remember. He may have been in with someone.

Q. Now, please try to confine yourself to answering my questions. I don't want a speech. Now, at the time when he first came in on September 9th he came in and presented a bill or some statement to you asking you for some money, did he not?

A. Yes, sir, that is right.

Q. He asked you for how much money?

A. Yes, he gave the amount.

Q. He gave the amount over \$1,000.00, is that correct?

A. Yes.

Q. And then you knew nothing about him, you didn't know the other man at all that was with him, did you?

A. No.

Mr. Margolis: Just a moment, may it please your Honor, the witness didn't testify that she knew there was someone else with him.

The Court: She says there may or may not have been, and she says she didn't know him if he was there.

Q. (By Mr. Berger): Now, do you mean to tell me and to tell the Court that out of a clear sky you told Mr. Norberg all about your financial condition **and financial position** when you didn't know anything about him?

Mr. Margolis: Just a moment. I submit, may it please your [188] Honor, that question is objection-

(Testimony of Nellie Lee.)

able on the ground that it is argumentative, "does she mean." I think counsel should ask——

The Court: You may reframe it.

Q. (By Mr. Berger): Miss Lee, am I given to understand that when you knew nothing about Mr. Norberg, didn't know who the man was, that you told him all about your financial condition of the corporation as to how much money you owed and all about that before you knew anything about him?

Mr. Margolis: Just a moment, Miss Lee. May it please your Honor, I would like to enter an objection here on the ground that it is incompetent, immaterial and on the further ground that it tends to mislead the witness. The witness testified that he presented a statement.

The Court: No, I will allow the statement. I think the witness can take care of herself. I don't think they are going to mislead her.

The Witness: May I explain to you?

The Court: Answer it, and then explain at some length.

A. You asked me why I would answer a stranger all those questions.

Q. No, I asked you whether or not you would tell a stranger all that information.

A. I had been answering all those very difficult questions many, many times.

Q. I am asking you whether or not this same stranger asked [189] you those questions before—you never saw him before?

A. He had never asked me before.

(Testimony of Nellie Lee.)

Q. Exactly. Then he came in the very first time on September 9th? A. Yes.

Q. And then you told him all about your financial condition of the corporation?

A. He introduced himself as a collecting agent and I am familiar that we do owe that money and he asked me, I was in a position and had to explain to him.

Q. You were in a position to know all about your financial condition, weren't you?

A. How the situation was with us, yes, sir.

Q. Even though you knew your financial condition by virtue of your financial statement, defendant's Exhibit D, you knew all about that, too, at that time?

A. The statement was not with me at that time.

Q. But you knew the contents of it, did you not?

A. Yes.

Q. How long did he talk to you at that time, the very first time?

A. I would say at least fifteen minutes.

Q. Fifteen minutes. And did you or did you not tell him to come back the next day, that you would have a check for him?

A. He requested an appointment. [190]

Q. I asked you a question, whether you did or did not tell him that you would have a check for him the next day?

A. I did not tell him that.

Q. Did you tell him that you would try to get a check for him the next day?

(Testimony of Nellie Lee.)

A. I did not tell him that.

Q. Did you tell him anything at all about your getting a check from the home office or the other plant?

A. I did not tell him that. We did not have that money.

Q. Did you say anything at all about getting a check? A. No, I did not.

Q. Did you tell him the money would or would not be paid?

A. I told him I would like to have the bill paid, we were working on additional capital, that was the only way to work out the problem.

Mr. Berger: Okay, that is all.

Mr. Margolis: We have no further questions. I would like to put Mr. Ludolf on for a few minutes.

The Court: All right. Is it something new or is it just repeat?

Mr. Margolis: Just rebuttal, your Honor, nothing new.

Mr. Berger: I don't know, your Honor; I was going to call Mr. Kolb back, but I think it would be nothing more than what has gone before.

The Court: Somebody has to have the last word. If there [191] is something that hasn't been brought out, all right, but if he is just going to deny the testimony of the defendant's witnesses, then do you want to go on and deny his testimony?

Mr. Margolis: I am always satisfied with the next to the last word.

The Court: We will have a denial and a re-denial but if there is anything new——

Mr. Margolis: I state to your Honor very frankly I am satisfied with next to the last word. There is nothing new, I am frank to state that. Just about these conversations.

The Court: I have a fair memory, I think I will remember what the testimony is.

Mr. Berger: I have no further witnesses, your Honor.

The Court: Then I will consider the case. Mr. Berger, I think I will hear from you.

Mr. Berger: Thank you, your Honor. First of all, if your Honor desires, I would be more than pleased to submit to your Honor a list of authorities, some of which I read the other day, but which will be touched upon in my very brief argument. I am going to try to make it very brief, and to give the authorities to support my contentions and to show the lack of proof that is required and necessary on the part of the plaintiff to prove two of the main important things as to the knowledge at the time of the attachment and the fact of insolvency at the time of the attachment, and naturally, the knowledge of [192] that at the time of the attachment, so with that in mind, if your Honor would desire, I would be more than pleased——

The Court: Well, I want the two issues here which are, first, was the corporation insolvent at the time of September 12th?

Mr. Berger: Let's take some of the exhibits.

The Court: Second, did the attachment know or have reason to know of that condition?

Mr. Berger: Of course, the burden to prove all of that is on the plaintiff. They must prove those two points, and if they can't prove them by a preponderance of the evidence they have no case. Now, let's take these things step by step if we possibly can. The fact that the corporation may be insolvent or may be in a financial condition at some later date hasn't anything to do with the issue. It must be on that date. Now, let's see, July 2nd, or rather May 31st, is the very first letter in evidence, Defendant's Exhibit A from the Brick O'Gold Corporation which was prior to the attachment, and all that states is that their inability to meet the bill to the Pacific Electrical Mechanical Company. In May. That doesn't show that they are in any way insolvent, just that they cannot meet their bill. Now, that in and of itself is not proof of insolvency. We then go to the July 2nd letter from the Brick O'Gold Corporation explaining what their capital asset is, they say approximately \$50,000.00, and it is intact, and they [193] desire that this corporation, this Pacific Mechanical Electrical Company, does not file the suit. Then a few days later their statement, financial statement, Defendant's Exhibit D, shows their true financial picture so testified to by both Miss Lee and Mr. Ludolf that they wanted everyone to rely upon it, they submitted it to the bank, or this RFC corporation that it was true and correct and that it should be believed, July 13, 1949. Now, where is any evidence in between any of those

dates, up to the date of September 12, 1949, to change the picture? In fact, Mr. Ludolf himself testified, rather not less than I think a half dozen times on direct, cross, and even upon question by your Honor, that the picture had not changed up as late as November, I think he said, from July when a statement was first made up. That they were exactly the same as far as their financial condition was concerned. Now, it isn't enough, if the Court please, to charge the defendant with knowledge of the insolvency or even their reasonable belief to know of the insolvency, if the Court please, or financially embarrassed, you might say, that is not enough information and not enough to charge them. I have authority on that. Even that the defendant may have cause to suspect the insolvency or the financial inability to pay, that is not enough. Mere suspicion on the part that they cannot pay is not enough and unwillingness to trust them any further is not enough and the unwillingness to trust further was by [194] Mr. Kolb but only—not because of their financial condition, but because of the financial inability to pin Mr. Ludolf down as he said. He would make appointments and wouldn't keep them. He would tell him he would have certain information about the financial statement and he wouldn't produce it. In other words, they didn't want to rely upon his word. But that has nothing to do with the assets or the financial ability of the corporation.

The Court: And yet you are suggesting that they had perfect faith in this financial statement?

Mr. Berger: I am not interested in what Mr. Kolb had faith in. I am interested only in what Mr. Norberg had at the time of the levy. Mr. Kolb, if your Honor please, entered the picture a long time afterwards, after September 12th. Number two, Mr. Norberg really had to go down to those meetings. He talked to them before hand, he talked to Miss Lee before and Mr. Ludolf before. They told him they would have a check. Of course, it is up to your Honor as to who to believe. It is up to your Honor to ascertain as to whether or not the preponderance of the evidence has been brought out and sustained by the plaintiff in telling that on September 12th or prior thereto Mr. Norberg, the defendant, had reasonable knowledge to believe the insolvency or that that corporation was insolvent. There has been no proof of that yet on that date. Now, the obtaining of additional security or the anxiety by a claimant [195] is not sufficient grounds. I have the authority for that, and receiving payment of the debt is not sufficient grounds. Now, just because a corporation wanted more money as they said, which was to tide them over, they had enough cash, they admitted they had enough cash, the only reason being that they couldn't use the cash was because as they said they had a suit and they called it a "phoney suit" tying up the money, which suit was brought by this accountant, I think he said, but the cash was there and was available. If they wanted to use the cash they could have certainly bonded, but they probably didn't desire or need or think that was necessary. They were

still in a financially sound condition according to their own statement on that date, and Mr. Norberg knew nothing about these other matters until long after the attachment. As I said, he didn't even have to go down there to find that out, but they asked him to go down there, the attorneys asked him to go down to check into it, and, as he said, the reason of going down, which is common, which is ordinary and which is proper, and I think, good business, was to get the check sooner. If he could have gotten it, why fine and dandy. Also, that if the creditor received the money in good faith as he did when he attached that and the receipt of the money in all the matters with reference to the execution dates, back to the date of the attachment, and that certainly was in good faith, there is no showing of any intentional preference or even [196] knowledge that there would be an intentional preference, and even then as set forth in the 23 Cal. 2nd 444, that wouldn't be a preference, or wouldn't have knowledge or wouldn't show a knowledge of an insolvency of getting the money at that time. He wanted his money as quickly as he could. The creditor is not charged with a knowledge that the corporation is insolvent merely because he cannot pay the bill at that time, if they are financially embarrassed or have that financial inability to pay. Or even the knowledge that the debtor has experienced difficulty in meeting his obligations also is not sufficient to charge with knowledge. True, as he said, they needed working capital. Well, that is a common occurrence of every corporation. It is

common practice, a lot of corporations need working capital and just because a corporation needs working capital and doesn't have it, it certainly would be a sorry picture that if every corporation that needed working capital was insolvent. We wouldn't have half the corporations. Probably your Honor will remember, perhaps in your own practice, in your corporation work, a lot of the corporations needed capital. I know I have in my work. A lot of the corporations I have represented needed a lot of capital, but by a long stretch of the imagination they were not insolvent. They manage to somehow get out of the difficulty, but just because they do need that financial stimulus, you might say, doesn't mean they are insolvent in the true sense of the word, especially [197] in view of Defendant's Exhibit D. Their own admissions, and, as I said, they could have avoided that financial inability to pay by putting up a bond in connection with that suit because that was the only reason they said he didn't have the money, because of that so-called "phoney suit." Now, with reference to Mr. Ludolf's credibility, your Honor will remember, I think your Honor asked him and I know I asked him several times about suits. Between August and November he knew nothing about any suits. He received no summons, he didn't know about any judgment or anything like that. He didn't know when he was served or if any member was served and Mrs. Lee corrected him when she said in September she got the summons, she got the summons in August, I think, on that other suit. She immediately told that

to Mr. Ludolf the very next day, that she received the summons, but he didn't remember that, or at least he wanted the Court to believe that he didn't know anything about it. The purpose of that statement I don't know or the purpose of that answer, why he answered that way I don't know, but at least it shows his credibility and with reference to that, it is rather odd, I feel, that Mr. Ludolf went along with the story in a sort of a chronological way, knew all about preference, knew all about everything before even some questions were asked him. As to the effect of that statement in that manner, why naturally I will have to leave it up to your Honor. Now, as far as Kolb's being unwilling [198] to trust further, as I said, that really is no part of the issue as far as we are concerned. We are not charged with any knowledge that Kolb may have had, only insofar as we went there, as Norberg said, to get the check in advance, that is in advance, I mean, in advance of that ten days or whatever days time for the obtaining of the default judgment, and they also said that they had no defense, money was due the corporation—due the radio station, and if that is the case why it wasn't a question of waiting, just a question of getting the money. Mr. Kolb didn't question the financial statement, he just questioned it—he wanted a breakdown on it, and he didn't say he didn't rely on it. He didn't rely on Mr. Ludolf. He didn't like the way he did the business that he managed and operated. He wanted Miss Lee to operate the business. Now, if he questioned the corporation's financial

status, if he questioned this statement, then obviously he wouldn't insist, or that is, his clients, rather, wouldn't insist that Mrs. Lee operate the business. If they felt that the business was of no value it wouldn't make any difference to them who would operate the business. They felt the business was a good thing. They felt the business could make money. They felt, probably, that the business didn't have the financial status according to the statement, but they didn't like the way Mr. Ludolf was conducting himself and that is why they didn't want to believe him. I think Mr. Kolb testified to that fact two [199] or three times. Does that show reason to believe that the corporation is financially unsound, insolvent? That wouldn't in and of itself show that point.

The Court: Mr. Berger, let's be frank about this thing and realize we are dealing with realistic business people. You, knowing your experience as I have in mind, know that a business man who is being pressed will always turn up with a financial statement and a hard-boiled collection agency or collection attorney doesn't pay very much attention to it. I have had that experience and so have you. If I could have gotten my clients away from pressure by showing financial statements, I never would have had any worries.

Mr. Berger: But—I am sorry, are you through?

The Court: No, go right ahead.

Mr. Berger: Your Honor, that is all very true. It is a common practice, but let's look at this financial statement. Before any pressure of any

kind was put on them, July 31st, before Mr. Kolb went after them, which was in August, before Mr. Norberg went after them, which was in September—this is in July. There is no proof of any kind as far as I remember, now I may be wrong in that, I may have forgotten some of the points, but there is no proof as far as I can remember that they were financially embarrassed in July other than the fact that they needed working capital as they said.

The Court: Other than the fact they needed working capital [200] and couldn't pay their bills, they went out and bought an umbrella before they read the weather forecast.

Mr. Berger: At the same time he said he had the accounts receivable from these stores, but he didn't want to press them. As far as he was concerned, the money was held in trust because the money was in possession of these various franchise stores and they had that money belonging to him. Had he pressed them, he could have gotten it, but he didn't want to press them. Therefore, his money, which he was entitled to, was spread out. A little too thin, perhaps, for his own financial good, but still it was there. It was spread out a little thin. He had to thicken, you might say, this spread and that is what he was trying to do. That, in and of itself, doesn't show insolvency, your Honor. That happens every day where corporations extend themselves either with the purchase of merchandise or the purchase of inventory, real estate, whatever it may be. They must have more working capital for

the present, everyday bills. And the fact that a creditor, long after the status is established of July 31st, comes in and says, "I want my money. Here you say you are in a position to pay, you have got the cash, why stall me any more?" and they give him some excuse or another, well, he doesn't have to wait. The fact of the matter is he can go in and attach, but he didn't. He gave them a chance and there is no reason to disbelieve Mr. Norberg to the effect that he waited between [201] September 10th and September 12th when he attached. He could have attached September 9th, but he went down to save the cost and said, "I want that check." They said, "Come back tomorrow," otherwise he wouldn't have had to come back tomorrow if they gave him a song and dance. He could have attached that same day, he could have left that store and gone down that same day and levied them with an attachment, but he didn't do it. He said he would come back September 10th. They said, "Come back in a few days. We will have the check." He still didn't attach and he could have had he just said, "Well, we just don't have the money. We are broke." Then, he came back on September 12th. Then they said, "Well, we will have to get more working capital." Well, then he knew that is a general practice, that they are giving him the runaround and as testified to by Mr. Kolb, the tactics employed by Mr. Ludolf, his inability to keep promises, his inability to conform to what he said, his inability to keep appointments, was very disappointing to him, also, and to his client and also to

Mr. Norberg. That doesn't show they are insolvent at that time. Now, with reference to Miss Lee, as I said, she more or less disapproved Mr. Ludolf's statement and really attacked his credibility as to that one point with reference to his having no knowledge of any prior suits, and also rather odd, leaving it up to your Honor to draw whatever inference your Honor desires, that when no question was asked, I brought that out to your [202] Honor I think, right after she testified, no direct question was asked her right after she was on the witness stand, she starts in giving her story all about what she told Mr. Norberg, all about the previous accounts, the previous indebtedness, all about the financial inability; well, first of all I don't know how she knew what questions were going to be asked her before the question was asked her. I don't know why she could give a statement that would be bearing on the very issue, she is no lawyer, bearing on the very issue of what was going to be developed, and then when it came to the point as to her knowledge of the statement, her knowledge of everything, oh, yes; she knew all about it, she knew all about the statement, she knew all about the assets. Then it is rather hard to believe that a woman of, I presume, very good ability as far as business was concerned, probably very good education, I don't know, it is none of my affair, but still it is hard to believe a woman in business would tell a stranger coming in asking for a bill all about their financial status. I think they would be ashamed to say that, or if she

would say that, that is the very first thing the stranger would do, would be to throw them into bankruptcy if they were that precarious, and as she said, she didn't want anyone to know of it, that would be exactly the opposite of what she would tell by her own admissions. She wouldn't start in telling a stranger all about their financial condition in insolvency, as [203] it were, their inability to pay. It stands to reason that that is farfetched, very farfetched, to your Honor and I know to me. If she did say all of that, then her other statement, that she was afraid of bankruptcy, falls by the wayside, because they are both contradictory to each other. Now, where in all this evidence, defendant's exhibits and plaintiff's exhibits, is there any proof as far as the defendant is concerned, that on September 12th or prior to September 12th the corporation was insolvent and that the defendant knew about it or had any reasonable knowledge to believe that, not just mere suspicions, as I said before, not all of those other matters that may give any inference that there may be an insolvency. There must be more than that. There must be the actual proof of something tangible, something that the Court can, you might say, sink its teeth into, and so far there hasn't been anything like that here. Now, if your Honor please, I would like, with your Honor's permission, to submit this list of authorities. I have them here in rough draft. It wouldn't take me very long to write them out in very short brief form, that the corporation must be insolvent at the time and our point of time is

September 12th, that the creditor has reasonable cause to believe them solvent and it must be proved to have existed at the time of the levy before the preference may be avoided. There are cases on that. As I said, the mere inability to meet the current obligations is not an insolvency. [204]

The Court: I am familiar with the law of the case.

Mr. Berger: I am sure that your Honor is a more—has more experience than I have and I know that reading those, why roughly, your Honor will have these in mind, but I would like to, with your Honor's permission, just give you a short memorandum of those authorities.

The Court: Well, gentlemen, I don't think it is necessary for you to argue the case.

Mr. Margolis: If your Honor does not wish to hear from me, I wouldn't labor your Honor with any arguments.

The Court: Mr. Berger, I have listened to you with a great deal of interest. You are a man of intelligent, able, interesting and ingenious arguments, and I thank you for it. It has been a pleasure to listen to a good lawyer argue a case. Now, I unfortunately do not agree with the facts in the case as presented and suggested in your argument. I think the plaintiff has made out his case. The issues in this case are narrow, but there are only two points to be considered by the Court, all the formal matters as to bankruptcy, qualification of the trustee and the suit and the attachment, recovery of the money and other acts, the dates and

everything else are fixed. Now, two issues are to be decided and that is my duty. First, was the bankrupt corporation, Pot O'Gold, insolvent at the time, September 12, 1949; and secondly, did the defendant here know or have reason to know of such insolvency and [205] thereby obtain or attempt to obtain a preference. As to the first question, the testimony I think is quite clear that the condition of the corporation varied a little, if any, from August 12th to the time of the petition and also the adjudication in bankruptcy and that it was not only insolvent at the time of the bankruptcy, but it was insolvent on August 12th and perhaps long prior thereto. And although the representatives of the corporation furnished a financial statement and perhaps gave many arguments and verbal statements as to how good the corporation was and how good it was going to be, and though a little thick it was going to recover, I think that the picture is quite clear that the corporation was in a dying, if not dead, condition at the time that is involved here, namely August 12th. And going to the second question as to whether the defendant here knew or had reason to know of such condition, we must remember that we are not living in a theoretical world, but in a hard, realistic business world. We are dealing with a corporation that was endeavoring to survive, officers who had put what little money they had in it and naturally wanted to save it, and with creditors who wanted their money and were entitled to their money and were right to press for the collection of their money

with all their resources and all legal weapons available. Mr. Norberg in charge of a collection agency was given this account to collect, his job was to collect it and he was right when he took a look into that [206] corporation's affairs to press for his money. He didn't wait long, he did wait two days apparently, and I don't blame him at all for attaching. If I had been in his position I think I would have done it too because a collection agency's business is to get the money if they can and to get it as fast as they can and before the other people in like plight get to the scene of the kill. And so I think that there was ample reason for this able collection agency to know or have reason to know that the corporation was insolvent and it was necessary to get it quickly, and he did. Now, he was serving his clients, I trust, well and faithfully and if only four months had elapsed they would have gotten their money and everything would have been all right from their standpoint. Unfortunately for them, bankruptcy never being within the statutory period, and I am of the opinion that that created, that that action on his part created the preference. I find as matters of fact that the corporation, Pot O'Gold, was insolvent as of August 12, 1949, and that the defendants knew and had good grounds or good cause to know of that condition and that their action in pressing the legal claims, attaching and collecting, were in the nature of preferences and should be so decided. The plaintiff will present a form of decree in accordance with my views as expressed here.

Mr. Margolis: May I make one observation. Your Honor has referred, perhaps inadvertently, and Mr. Berger, by his [207] action was going to correct you, the Clerk called my attention to it as well, your Honor has referred three or four times to a date as August 12th. I think your Honor meant September 12th.

The Court: Inadvertently I said August 12th. September 12th is, of course, in the pleading and all testimony.

[Endorsed]: Filed November 27, 1950. [208]

[Endorsed]: No. 12747. United States Court of Appeals for the Ninth Circuit. J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. North Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, Appellants, vs. Paul W. Ryan, Trustee of the Estate of Brick O'Gold, a corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 27, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12747

HARRY F. MEILINK, Trustee of the Estate of
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business
as NORBERG ADJUSTMENT BUREAU;
HOPE D. PETTEY, WILLIAM B. DOLPH,
ALICE HUSTON LEWIS, HELEN S.
MARK, ELIZABETH BINGHAM, D.
WORTH CLARK, EDWIN P. FRANKLIN,
GLENN A. G. DOLPH, Individually and Do-
ing Business as Co-partners Under the Firm
Name and Style of KJBS BROADCASTERS,
FIRST DOE, SECOND DOE, and THIRD
DOE,

Defendants.

CONCISE STATEMENT OF POINTS

Pursuant to Rule 75-d of Rules of Civil Proce-
dure, the appellants make the following concise
statement of points upon which they intend to rely
upon this appeal.

I.

The Order, Judgment and Decree of the Court
was erroneous in that it decreed that Brick O'Gold,
a corporation, was insolvent on the date of payment
of the alleged preference.

II.

The Order, Judgment and Decree of the Court was erroneous in that it fixed the valuation of the bankrupt's assets at the time of adjudication instead of the time of the alleged preference.

III.

The Order, Judgment and Decree of the Court was erroneous in that the Court found that the Appellants had "reasonable cause to believe that the debtor was insolvent."

IV.

The Order, Judgment and Decree of the Court was erroneous in awarding judgment to the Appellee in the sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40).

Respectfully submitted,

/s/ WILLIAM BERGER,

Attorney for Appellants.

[Endorsed]: Filed January 10, 1951.

[Title of Court of Appeals and Cause.]

APPELLEE'S STATEMENT AND DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL UNDER RULE 19

To the Above-Entitled Court and to Paul P. O'Brien, Esq., Clerk of Said Court and to William Berger, Esq., Attorney for the Above-named Appellants:

Appellee above named, in accordance with the provisions of Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, designates the following as the additional portion of the record, proceedings and evidence to be contained in the Transcript of Record on appeal, notice of which said appeal has heretofore been filed by said appellants, as follows:

1. Complaint to Recover Preference, filed May 24, 1950;

2. Answer, filed June 9, 1950;

3. Findings of Fact and Conclusions of Law, filed August 9, 1950;

4. Judgment After Trial by Court, filed August 9, 1950;

Notice of Appeal, Clerk's Certificate;

5. All of the remaining portion of the reporter's transcript, pages 1 through 208, inclusive, not designated by appellants' Record on Appeal, filed on March 9, 1951, with the Clerk of the above-entitled Court;

6. This Appellee's Statement and Designation of additional portions of Record on Appeal Under Rule 19; and

7. Affidavit of Service by Mailing.

Respectfully submitted,

MAX H. MARGOLIS,
JAMES M. CONNERS,

By /s/ MAX H. MARGOLIS,
Attorneys for Appellee.

[Endorsed]: Filed March 16, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION FOR SUBSTITUTION
OF APPELLEE

It appearing that Harry F. Meilink, Trustee of the estate of Brick O'Gold, a corporation, the above-named appellee, who was the duly appointed, qualified and acting Trustee of the estate of Brick O'Gold, a corporation, bankrupt, being No. 29769 of the files and records of the Clerk of the District Court of the United States for the Northern District of California, died on January 8, 1951; and it further appearing that after proceedings duly and regularly had before the Referee in Bankruptcy in said pending bankruptcy proceedings, one Paul W. Ryan on March 22, 1951, was duly and regularly appointed Trustee of the estate of said Brick O'Gold, a corporation, bankrupt, and thereafter qualified as such and is now the duly appointed,

qualified and acting Trustee of the estate of said Brick O'Gold, a corporation, bankrupt,

Now, Therefore, it is Hereby Stipulated by and between the attorneys for the above-named appellee and the attorney for the above-named appellants that Paul W. Ryan may be substituted in place of said Harry F. Meilink, deceased, as appellee in the above-entitled matter.

Dated: April 9, 1951.

MAX H. MARGOLIS,
JAMES M. CONNERS,

By /s/ MAX H. MARGOLIS,
Attorneys for Appellee.

/s/ WILLIAM BERGER,
Attorney for Appellants.

[Endorsed]: Filed April 10, 1951.

No. 12,747

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. R. NORBERG, an individual doing
business as Norberg Adjustment
Bureau; HOPE D. PETTEY, WILLIAM
B. DOLPH, ALICE HUSTON LEWIS,
HELEN S. MARK, ELIZABETH N.
BINGHAM, D. NORTH CLARK, EDWIN
P. FRANKLIN, GLENNA G. DOLPH,
individually and doing business as
copartners under the firm name and
style of KJBS Broadcasters,

Appellants,

vs.

PAUL W. RYAN, Trustee of the Estate
of Brick O'Gold (a corporation),

Appellee.

**Appeal from a Judgment of the United States District Court
for the Northern District of California, dated
August 9, 1950 and filed August 9, 1950.**

APPELLANTS' OPENING BRIEF.

WILLIAM BERGER,

995 Market Street, San Francisco 3, California,

Attorney for Appellants.

PAUL J. O'BRIEN,

CLERK



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No. 12,747

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. R. NORBERG, an individual doing business as Norberg Adjustment Bureau; HOPE D. PETTEY, WILLIAM B. DOLPH, ALICE HUSTON LEWIS, HELEN S. MARK, ELIZABETH N. BINGHAM, D. NORTH CLARK, EDWIN P. FRANKLIN, GLENNA G. DOLPH, individually and doing business as copartners under the firm name and style of KJBS Broadcasters,

Appellants,

VS.

PAUL W. RYAN, Trustee of the Estate of Brick O'Gold (a corporation),

Appellee.

Appeal from a Judgment of the United States District Court
for the Northern District of California, dated
August 9, 1950 and filed August 9, 1950.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

Appellant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, in an attempt

to collect a claim filed in his office due a creditor of bankrupt corporation, called upon one of the bankrupt's stores for the first time on September 9, 1949 (Tr. p. 143). On that date a demand was made for the payment of the sum of \$1,076.40 and appellant was told to call back the next day and pick up a check (Tr. pp. 143-144). Acting upon such request, appellant returned the next day for the purpose of collecting the money and then for the first time met the president of the corporation, a Mr. Paul Ludolph (Tr. p. 142), and appellant was then informed that the bankrupt did not have the ready cash in its possession and would have a check the following Monday (Tr. p. 145), and was also informed at that time that the corporation was not insolvent and would pay its bill (Tr. pp. 152, 155).

Mr. Ludolph testified that on Saturday, September 8, he first saw the appellant (September 8, 1949, was on a Thursday), and on such September 8, stated that he showed a financial statement which was prepared by its C.P.A. (Tr. pp. 32-33, 43). On September 12, 1949, appellant filed an action against the corporation and caused a writ of attachment to be issued and levied, and thereafter on October 9, 1949, caused a writ of execution to be levied upon the attached property and received the sum of \$1,076.40 as full payment and satisfaction of the judgment obtained in said action.

The witness, Ludolph, further testified from the schedule in bankruptcy which was filed November 9,

1949, that the financial condition of the corporation was the same on September 12, 1949, as it was when the petition in bankruptcy was filed (Tr. pp. 29-30) and that there were balances due them from certain franchise stores (Tr. p. 47).

Such witness also admitted that he showed the appellant the financial statement of the corporation dated July 31, 1949 (Tr. pp. 32, 44-45), and which was introduced in evidence as Defendants' Exhibit "D" (Tr. p. 102). Such witness also admitted that the bankrupt corporation was attempting to secure an "R.F.C." loan (Tr. pp. 50-51, 53) and that the application for the R.F.C. loan was based upon such financial statement, Defendants' Exhibit "D" (Tr. pp. 54-55).

Mr. Ludolph's testimony also showed that the first time the appellant talked to him, he did *not* inform the appellant that they were insolvent, but stated that "it would ruin our chances to get any capital * * *" (Tr. pp. 33-34). (Emphasis and quotation ours.)

A Mr. Theodore A. Kolb, an attorney at law, who had some dealings with defendant corporation after the attachment was levied and before the petition in bankruptcy was filed, testified as a witness on behalf of the appellant herein, and stated that Mr. Ludolph admitted to him that in spite of a poor winter their business showed large gains each month and their business looked bright. (Tr. p. 73—Appellant's Exhibit "B" in evidence which was written on July 2, 1949), and that as late as August of 1949 they were

completely solvent but couldn't get their collections from accounts as fast as anticipated (Tr. pp. 82-83).

It appears that the only complaint made by the witness, Mr. Ludolph, was that the action filed by an accountant for the sum of \$500.00 voided him of working capital (Tr. pp. 87 and 88). At the suggestion of Mr. Kolb, taking advantage of the bankruptcy statute, the witness further testified that Mr. Ludolph did not desire to take advantage of the bankruptcy statute, the reason "being because I am solvent", and again referred to the financial statement in evidence (Tr. pp. 88, 95, 98, 101).

Mr. Kolb further testified that the largest creditor of the bankrupt, the Samarkand Ice Cream Company, was also satisfied that the bankrupt corporation at that time was in a solvent condition (Tr. p. 90), and that another officer of the corporation, Miss Nellie Lee, also told Mr. Kolb that the corporation was solvent (Tr. pp. 94-95, 98-99, 101, 104).

Miss Nellie Lee, a witness on behalf of the plaintiff and an officer of the corporation, as aforesaid, admitted that the corporation "was in financial difficulties" (Tr. pp. 117, 122) (quotation ours), and didn't have the money to pay the obligation. It is to be noted that not a word was said about insolvency at that time by Miss Lee. Miss Lee also admitted that the financial statement (Exhibit "D") was prepared for the purpose of getting an R.F.C. loan (Tr. p. 128), and that it was a true and correct picture of the corporation and summary of the assets and lia-

bilities of the corporation (Tr. pp. 118-119). She also admitted that she informed both Mr. Kolb and the appellant herein that the corporation was "*sound*" (Tr. p. 132), and that the only concern of such witness was that at that time they did not have the money to pay the appellant (Tr. pp. 133-134).

Miss Lee also testified that the corporation had accounts receivable and that if they could collect them, they would be able to pay all creditors (Tr. pp. 131-132).

It will also be noted that the conversation with Mr. Kolb and the conversation between Mr. Kolb and Miss Lee and Mr. Ludolph in Mr. Kolb's office was *after* the attachment had been issued and levy made (Tr. pp. 124-125). The appellant herein corroborated the testimony of both Miss Lee and Mr. Kolb with reference to the financial statement that the corporation was in a solvent condition and that they were attempting to obtain an R.F.C. loan (Tr. pp. 151-152). Mr. Norberg also testified that bankruptcy was suggested by Mr. Kolb, but that both Miss Lee and Mr. Ludolph did not desire to file a petition in bankruptcy or reorganize the corporation, and as they stated, they were not insolvent but needed a little more time to convert their assets into cash (Tr. pp. 153, 155).

It appears that the Court at the very commencement of the case seemed to have made up its mind in the matter by its remarks made during the course of the trial, and before all of the evidence was introduced, as the Court seemed to indicate that Mr. Kolb

was "not satisfied with the situation" (Tr. p. 83), when such was not the fact. The Court also indicated that whatever information was obtained by appellant, even long after the levy of writ of attachment, it would prove "a state of his mind on September 12" (Tr. p. 189). In other words, information obtained at a later date would be evidence of actual knowledge on the part of the appellant on September 12, 1949.

The Court also indicated that the financial statement (Defendants' Exhibit "D") was practically of no value and didn't mean anything and should not have been relied upon, but inferred that a financial statement should have been a warning or given reasonable grounds to believe that the corporation was then in an insolvent condition (Tr. pp. 203-204).

It is also to be noted that Mr. Ludolph testified from the schedule in bankruptcy long before they were admitted into evidence, and respondent introduced them into evidence upon the statement of the Court "that the schedules should be in" (Tr. p. 135). Obviously an objection to the introduction of said schedule would have been of no avail.

QUESTIONS INVOLVED.

(1) Was the bankrupt corporation Brick O'Gold solvent on September 21, 1949, the date of the attachment?

(2) Was the Court in error in fixing the valuation of the bankrupt's assets as of the time of adjudica-

tion instead of at the time of the attachment, the date of the alleged preference?

(3) Was there sufficient evidence for the finding that the plaintiffs had "reasonable cause to believe that the debtor was insolvent on September 12, 1949?"

SPECIFICATIONS OF ERROR RELIED UPON.

I.

The order, judgment and decree of the Court was erroneous in that it decreed that Brick O'Gold, a corporation, was insolvent on the date of payment of the alleged preference.

II.

The order, judgment and decree of the Court was erroneous in that it fixed the valuation of the bankrupt's assets at the time of adjudication instead of the time of the alleged preference.

III.

The order, judgment and decree of the Court was erroneous in that the Court found that the appellants had "reasonable cause to believe that the debtor was insolvent".

IV.

The order, judgment and decree of the Court was erroneous in awarding judgment to the appellee in the sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40).

ARGUMENT.

In this proceeding where the trustee in bankruptcy claims a voidable preference, the section of the Bankruptcy Act applicable is *Sec. 60 of the Bankruptcy Act of 1938*:

“Sec. 60. PREFERRED CREDITORS. (a) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor *while insolvent and within four months* before the filing by or against him of the petition in bankruptcy * * *

(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, *reasonable cause to believe that the debtor is insolvent.*”

DEFINITION OF INSOLVENCY.

On the question of the definition of “insolvent”, the Court’s attention is directed to Chapter 1, Subdivision 19 of the Bankruptcy Statutes of 1938, reading as follows:

“(19) A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.”

FAIR VALUATION OF PROPERTY.

Collier on Bankruptcy, Vol. 1, p. 22:

“Fair valuation has been held to be the present market value, and not the amount which he might realize from a forced sale of the property. (Citing a number of cases.) The fair ‘market value’ of assets is that value which the debtor himself might have realized thereon if permitted to continue in business. The value of the property as part of the bankrupt’s business as a ‘going concern’ should be considered rather than the value after bankruptcy has intervened and the property has ceased to be productive.” (See, also, *Jarvis v. Bell*, 146 Atl. Rep. 153, and *Remington on Bankruptcy*, 4th Ed., Sec. 2264.)

REASONABLE CAUSE TO BELIEVE THAT THE DEBTOR IS INSOLVENT.

The Court’s attention is directed to the following cases in point:

Cate v. Certain-teed Prod. Corp., 23 Cal. (2d) 444, at 452-453.

Facts: Defendant knew that the debtor’s account was over four months delinquent and did not ship any materials to it for that reason; that reports from Dun & Bradstreet showed the bankrupt was slow in paying its obligations, one account being over six months in default, and advised defendant that the debtor was going to have a bulk sale of its stock in trade; that the defendant contacted the debtor to obtain a settlement and found the latter’s place under

attachment; that the check given in settlement was postdated and was not paid when presented to the bank on two successive occasions because of insufficient funds. Defendant made insistent demands for payment.

The Court states:

“It may be inferred from the evidence that the lack of funds to pay the check was not necessarily an indication of insolvency but rather that the debtor’s collections on his accounts receivable were slow and hence that the debtor was short of ready cash. Shortage of cash would not necessarily indicate to a reasonably prudent business man that the aggregate of the debtor’s property, exclusive of that which he may have transferred with intent to hinder or delay his creditors was not at a fair valuation sufficient to pay his debts.”

Citing the case of:

Grant v. First National Bank, 97 U.S. 80 (24 L. Ed. 971).

“Some confusion exists in the cases as to the meaning of the phrase, ‘having reasonable cause to believe such a person is insolvent.’ Dicta are not wanting which assume that it has the same meaning as if it had read, ‘having reasonable cause to suspect such a person is insolvent.’ But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor’s insolvency, in order to invalidate a security for his debt. To make mere suspicion a ground of nullity

in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it—and yet such belief as the Act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the Bankrupt Law an engine of oppression and injustice. It would, in fact, have the effect of pro-

ducing bankruptcy in many cases where it might otherwise be avoided.”

Gray v. Little, 97 Cal. App. 442, at page 446:

“The fact, alone, that a creditor knows his debtor to be financially embarrassed and is pressing for a payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent. Mere suspicion that the debtor may be insolvent is not sufficient to render payments received by a creditor voidable as preference, but he must have such knowledge of facts as to induce a reasonable belief of insolvency.”

Citing the following cases:

Sharpe v. Allender, 170 Fed. 589;

Page v. More, 179 Fed. 988;

Bassett v. Evans, 253 Fed. 522;

City National Bank v. Slocum, 272 Fed. 11;

Homan v. Hirsch, 106 Or. 982 (211 Pac. 795);

Grant v. National Bank, 97 U.S. 80 (24 L. Ed. 971);

In re Campion, et al., 256 Fed. 902.

See, also:

Wrenn v. Citizens Nat'l Bank, 47 A.B.R. 115
et seq.

Miceli v. Morgano, 36 Fed. (2d) 507.

Facts: The debtor was unable to pay upon demand; one of the debtor's notes was protested; the debtor sought to raise money by obtaining endorsements on notes by creditors.

Held: Mere suspicion of insolvency is not enough.

In re Salmon, 249 Fed. 300.

Facts: Debtor complained of being in financial difficulties.

Held:

“The law is well established that, even if the creditor entertains doubts concerning solvency of the debtor, it is not enough. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the judgment will give him preference.”

In re Wolf Co., 164 Fed. 448.

Facts:

“It was plain that the company was in embarrassed circumstances. Its debts were known to be large, its operations extended, and some of them, at least, unprofitable, and new capital was needed to carry on the business.”

Held:

“A creditor of a bankrupt, who is put on inquiry as to the solvency of the debtor, was not for that reason charged with notice of facts which could only be learned from intimate and inaccessible sources, such as the books of the bankrupt.”

Stucky v. Masonic Savings Bank, 108 U.S. 74.

Held:

“A creditor, dealing with a debtor, whom he may suspect to be in failing circumstances, but of which he has not sufficient evidence, may receive payment without violating the law. He may

be unwilling to trust him further; he may feel anxious about his claim; yet such belief as the Act requires may be wanting.”

Valley National Bank v. Westover, 112 Fed. (2d) 61.

Facts: The bank knew that the bankrupt was delinquent on another claim. And it had refused earlier to make the debtor a loan, but only because the requested loan was considered too large for the capitalization of the bankrupt.

Held: The lower Court held for the trustee. Judgment was reversed.

BURDEN OF PROOF.

The burden of showing that the person receiving the preference had knowledge or reasonable cause to believe that the debtor is insolvent is upon the trustee.

Collier on Bankruptcy, Vol. 2, p. 1328.

“The law presumes that such payments are legal and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption and establish the essential elements of a voidable preference.” Citing a great number of cases in the Federal Courts.

Collier on Bankruptcy, Vol. 2, p. 1330.

“All this must be done by a fair preponderance of all the evidence in the case, and where infer-

ences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer or security. This burden may be shifted to the person to whom the transfer was made, where it appears that the parties are relatives and the circumstances were such as to put the transferee upon his guard."

Remington on Bankruptcy, 4th Ed., Sec. 2259.
 "The trustee * * * must prove the truth of each of his allegations necessary to set forth a cause of action * * * the general rule is that fraud must be made out by a preponderance of the evidence, which should be so clear and strong as to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud or act in bad faith."

See, also:

In re Locust Building Company, 299 Fed. 756.

Remington on Bankruptcy, 4th Ed., Sec. 2290.
 "The complaint * * * and the proof must show that the bankrupt was at the time insolvent and an 'allegation' (or proof) * * * that the bankrupt was in failing circumstances and unable to meet his debts are insufficient * * * such is not equivalent to insolvency. * * * The insolvency must be proved as of the date of the transfer."

Trumlin v. Bryan, 165 Fed. 166.

"The burden of proof is on the complainant, and unless he shows by sufficient evidence the ele-

ments of avoidable preference, he is not entitled to recovery. He must prove that * * * the person receiving the payment or to be benefited thereby had reasonable cause to believe that it was thereby *intended to be given a preference.*”

OBTAINING SUBSEQUENT KNOWLEDGE IS IMMATERIAL.

Martin v. Bigelow, 7 A.B.R. 218, at 220.

“To say of a man that he is in failing circumstances or that he is unable to pay all of his debts in full * * * is quite a different thing from alleging that his property taken in a fair valuation is not sufficient in amount to pay his debts; and his adjudication as a bankrupt on March 11, 1901, does not relate back and establish a fact of his insolvency in the preceding November.”

Wrenn v. Citizens National Bank, 47 A.B.R. 115 *et seq.*

“The fact that the depositor’s balance in a bank was insufficient to meet his note when it came due was not proof of his insolvency * * * neither may his solvency on that date be proven by his insolvency at a later date. * * * It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have some knowledge of the facts as to induce a reasonable belief of his debtor’s insolvency * * * subsequent knowledge of a creditor is not material, and it does not matter what the debtor knew.”

**THE BANKRUPTCY SCHEDULES WERE IMPROPERLY
ADMITTED IN EVIDENCE.**

Remington on Bankruptcy, 4th Ed., Sec. 2260.

“The schedules of a bankrupt are inadmissible against the transferee as they are not his admissions. Schedules were admitted for the purpose of showing insolvency of debtor at the time * * * they are hearsay as against the defendant, and the defendant is not bound by them.”

CONCLUSION.

Taking the points in their chronological order, it therefore follows:

(1) What knowledge was there on the part of the appellant on the date of the levy of the writ of attachment, as to the insolvency of the debtor? The mere fact that at a later date it developed that because the debtor was forced into bankruptcy and his assets thereby dwindled to naught, does not and cannot relate back to the date of the levy of writ of attachment. Unless the trustee, by a preponderance of the evidence, proves each element of the preference to the effect that on that date the appellant must have known from the evidence and facts presented to him that the debtor was a bankrupt, then the trustees has not proven his case. Certainly there was no reason for the appellant *not* to rely upon the financial statement

as presented to him, showing the financial status of the bankrupt on the date of the attachment.

Dated, San Francisco, California,
June 27, 1951.

Respectfully submitted,

WILLIAM BERGER,

Attorney for Appellants.

No. 12,747

United States Court of Appeals
For the Ninth Circuit

J. R. NORBERG, an individual doing
business as Norberg Adjustment
Bureau; HOPE D. PETTEY, WILLIAM
B. DOLPH, ALICE HUSTON LEWIS,
HELEN S. MARK, ELIZABETH N.
BINGHAM, D. WORTH CLARK, EDWIN
P. FRANKLIN, GLENNA G. DOLPH,
individually and doing business as
copartners under the firm name and
style of KJBS Broadcasters,

Appellants,

vs.

PAUL W. RYAN, Trustee of the Estate
of Brick O'Gold (a corporation),

Appellee.

Appeal from a Judgment of the United States District Court
for the Northern District of California, dated
August 9, 1950 and filed August 9, 1950.

BRIEF FOR APPELLEE.

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155 Montgomery Street, San Francisco 4, California,

JAMES M. CONNERS,

444 Market Street, San Francisco 5, California,

Attorneys for Appellee.



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BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The appellee's predecessor filed a complaint, in the Southern Division of the United States District Court for the Northern District of California, against appellants, to recover a preference. (T. 3-7.) Each of the appellants appeared and answered to the merits. (T. 8-9.) Following the trial, findings of fact, conclusions of law, and judgment after trial by the Court were made and entered by the trial judge. (T. 9-15.) Notice of appeal therefrom to this Court was filed by appellants on September 7, 1950. (T. 16.) Jurisdiction of this Court upon appeal to review the said judgment of the District Court is therefore sustained by Section 24, subdivisions a and b, of the Bankruptcy Act. (11 U.S.C.A., Sec. 47, subds. a and b.)

STATEMENT OF THE CASE.

The appellee is the substituted trustee for Harry F. Meilink, deceased (T. 215-216), of the estate of Brick O'Gold, a corporation, against which an involuntary petition in bankruptcy was filed on November 9, 1949, and said corporation was adjudged bankrupt on November 28, 1949. (T. 4.)

On May 24, 1950, the trustee filed a plenary action to recover from the appellants a preference (T. 3-7), alleging that appellant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, on an assigned claim from the remaining appellants, a co-partnership, filed a suit on or about September 12,

1949, in the Municipal Court of the City and County of San Francisco, State of California, to recover a claim due to the assignor from the bankrupt; a writ of attachment was issued and levied on the property of bankrupt on September 13, 1949 and thereafter, upon procurement of a judgment against bankrupt, a writ of execution was issued and levied on bankrupt's property as a result of which appellants on October 5, 1949 came into the possession of \$1076.40. (T. 3-7.) The answer, by failure to deny, admits the filing of the involuntary petition against bankrupt on November 9, 1949 and subsequent adjudication; and the appointment and qualification of the predecessor appellee as trustee of bankrupt's estate. The answer denies other allegations of the complaint, but admits the filing of the suit on or about September 12, 1949, the levying of a number of attachments on debtors of the bankrupt, and alleges the procurement of a judgment, and on execution appellant, J. R. Norberg, obtained \$1076.40 on October 5, 1949. (T. 8-9.)

The action was tried on the two issues, (a) the insolvency of the bankrupt at the time of the attachment, and (b) knowledge or reasonable cause to believe bankrupt was insolvent at that time. (T. 20.)

Comment is necessary on the form of appellants' brief. It contains no specification of error, with respect to the admission into evidence of bankrupt's schedules, as required by Rule 20, subdivision 2(d) and (f) of this Court, nor is urged error on this point particularly set out (App. Op. Bf. 7 and 17), although

litigants and their counsel have been admonished the said Rule 20 must be strictly observed. (*McClyman, et al. v. Hamilton*, 9 Cir., 1950, 180 F. (2d) 965, 967; *Hemphill Schools v. Commissioner of Internal Revenue*, 9 Cir., 1943, 137 F. (2d) 961, 963; *Chapman Bros. Co. v. Security-First National Bank*, 9 Cir., 1940, 111 F. (2d) 86, 87; *Sampsell v. Anches*, 9 Cir., 1940, 108 F. (2d) 945, 948; *Century Indemnity Co. v. Nelson*, 9 Cir., 1937, 90 F. (2d) 644, 651; *Muyres v. United States*, 9 Cir., 1937, 89 F. (2d) 783.)

ARGUMENT OF THE CASE.

Summary of argument.

1. The evidence in the record is sufficient to support the findings and judgment of the trial Court. It satisfies the only two elements which were in dispute and upon which the trial proceeded and was concluded, for it establishes (a) a transfer of property of the debtor to the appellant creditors while the debtor was insolvent, (b) made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

2. The contention that the judgment fixed the value of bankrupt's assets at the time of adjudication instead of the time of the preference is without merit.

3. The substantial rights of appellants were not affected by the introduction of the bankruptcy schedules. Appellants have not affirmatively shown error,

in that the record discloses appellants did not object to the trial Court considering the bankrupt's schedules.

4. The judgment of the trial Court was sound in law and sound in fact and therefore should be affirmed by this Court.

1. THE EVIDENCE IN THE RECORD IS SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT.

Rule 52, subdivision (a), of the Federal Rules of Civil Procedure (28 U.S.C.A. fol. Sec. 723c) provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”

In *Wittmayer v. United States*, 9 Cir., 1941, 118 F. (2d) 808, it was said, at page 811:

“The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. *Silver King Coalition Mines Co. v. Silver King C. M. Co.*, 8 Cir., 204 F. 166, 177.

The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and ap-

plied by courts of equity. *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. (2d) 46, 47.

As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L.Ed. 356 (citing *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

In *Grace Bros., Inc. v. Commissioner of Internal Revenue*, 9 Cir., 1949, 173 F. (2d) 170, it was said at page 173:

"In the application of this rule and of the equity rule, which prior to the adopting of the Federal Rules of Civil Procedure governed review of equity cases only and which the rules made of universal application in all civil cases, *United States v. United States Gypsum Company*, 1948, 333 U.S. 364, 394, 68 S.Ct. 525, reviewing courts have emphasized the importance of the conclusions of the trial judge which derive from his opportunity to pass upon the credibility of witnesses their own way. *Davis v. Schwartz*, 1895, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; *Adamson v. Gilliland*, 1917, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; *Wittmayer v. United States*, 9 Cir., 1941, 118 F. 2d 808, 810; *Gates v. General Casualty Company of America*, 9 Cir., 1941, 120 F. 2d 925, 927; *Augustine v. Bowles*, 9

Cir., 1945, 149 F. 2d 93, 96; and see 'Findings in the light of the Recent Amendments to the Federal Rules of Civil Procedure,' 8 F.R.D. 271, 289-291, and cases cited in the footnotes 6-9."

And in *United States v. Lambeth*, 9 Cir., 1949, 176 F. (2d) 810, it was said, at page 813:

"On the evidence adduced, the trial judge found that at all times here relevant appellee was not serving the public and was thus not furnishing a public performance for profit within the definition of the Federal taxing statute. The two witnesses for the Government failed to convince him otherwise and he ordered judgment for appellee in the amount of the refund, plus interest.

On this record we think the case falls within Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. in part providing: 'Findings of fact shall not be set aside unless clearly erroneous, * * * ' Clear error calling for reversal is not present and the Government's presentation fails to convince us otherwise."

Tested by the foregoing rules, the record discloses ample evidence to support the two elements of voidable preference which formed the issues tried and the findings to that effect made by the trial Court against appellants.

(a) The transfer was made while the debtor was insolvent.

The trial Court made the following findings:

"(3) That within four (4) months next preceding the filing of said involuntary petition in

bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O'Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O'Gold, a corporation, bankrupt, * * *

(4) That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 11-12.)

There is ample evidence in the record to support the finding that at the time the transfer was made the debtor was insolvent. The president of bankrupt corporation testified as follows:

"Q. Can you tell us, Mr. Loudolph, were you in active conduct of the corporation's business in September, 1949?

A. Yes, sir.

Q. Do you know what the assets and liabilities of the corporation consisted of?

A. Yes, sir.

Q. Can you tell the Court substantially what the assets were on September 12, 1949?

A. Well, the market value of the assets were approximately——

Mr. Berger. Just a moment. I will object to that, your Honor. The question was what were the assets, not what were the value of the assets.

The Court. What were the assets, and then you may value them. What did the assets consist of, real estate, personal property, manufacturing merchandise?

A. The assets consisted of plant and equipment, accounts receivable, notes receivable, very little cash, truck equipment. * * * (T. 22-23.)
* * * * *

“Q. Did the corporation own this equipment you speak of free and clear?

A. No, we had a chattel mortgage with the Pacific National Bank, San Francisco.

Q. And was that property subsequently sold by the bank?

A. Yes, they sold it.

Q. And what was the balance due and owing the bank at the time of the levy of this attachment on September 12, if you know?

A. \$9,000, plus a small amount of interest, but the loan was \$9,000.

Q. And what did the property bring upon sale?

A. \$5999.99.

Q. \$5999.99. Now, were all of the accounts receivable collectable on September 12, 1949?

A. No. One of our main troubles was that the accounts receivable were not collectable. The stores were not doing well.

Q. Now, you have set forth here under schedule A-3 the list of names, addresses and amounts of the unsecured creditors, is that correct? Will you take a look at the schedules which you signed?

A. This is a correct list of our creditors.

Q. And how much was owing at the time of the execution of the schedules?

13

The Court. That was in November?

Mr. Margolis. That is correct.

A. About \$43,000 on these unsecured. I notice some salaries in here, might make that a little higher.

Q. Yes. Was the amount more or less on September 12, 1949?

A. No, it was approximately the same because we got—our situation became so bad that we had to pay cash for everything. We operated on a COD basis; everybody put us on a COD.

Q. Now, outside of the accounts receivable, did you have any other assets?

A. We had some notes on balance due of stores that was pledged to the Pacific National Bank along with the plant and equipment.

Q. Did you have any equity in those notes on September 12, 1949?

A. Yes, we had some equity—I don't know, because the bank still has the notes and they realized \$6000, or \$5999, and I don't know just how they came out on the balance. I know it made some settlements, but they were very low.

Q. Were all of the equity or value of the notes plus whatever could be recovered on the accounts receivable and any other assets you had sufficient to pay the general creditors?

A. No.

The Court. What were the accounts receivable as shown in the petition for bankruptcy? Aren't they set out in the assets.

Mr. Margolis. They are, Your Honor.

The Witness. I could give them at the time very closely but—

Q. (by Mr. Margolis). Look at schedule B-3. Probably not familiar with the caption, the witness isn't.

The Court. Yes, you find it for him.

Q. (by Mr. Margolis). The court wants to know what the accounts receivable were, Mr. Loudolph? You find them under schedule B-3.

A. They are in a total of approximately \$13,500, some cents.

Q. Did you have any other assets?

The Court. You say those accounts receivable were not very good, there were not a great many of them collectable?

The Witness. They weren't collectable because the stores were not making money. We gave this credit to hope for the better, which never happened. If we ever tried to collect these the stores would have to close.

Q. (by Mr. Margolis). Did you owe any taxes also, Mr. Loudolph?

A. Yes, sir.

Q. Will you look at schedule A-1 and tell how much in taxes you owed; schedule A-1 as set forth there?

A. \$976.

Q. I notice also on the schedule A-4, signed by yourself as president of the Brick O'Gold, that there was an obligation to the Morris Plan in the sum of \$14,866.

A. That is a contingent liability. The stores bought—when the people bought the stores they financed with the Morris Plan, some of them did. We went on the notes along with them as a contingent liability.

Q. And at the time of the attachments, September 12, 13, 1949, did you owe the Morris Plan any money?

A. Did we owe them besides this contingent liability?

Q. Yes.

A. We owed them a small amount, maybe \$2000. It was covered by the truck equipment and automobile.

Q. I see.

Mr. Margolis. Now, I exhibit to counsel, Your Honor, the claims from the clerk's office being 31 in number.

The Court. Unsecured creditors?

Mr. Margolis. That is correct, Your Honor. I haven't run a total on them as yet, Your Honor. I just picked them up this morning. They represent the claims approved and allowed. Subject to checking, however, if Your Honor please, in that file of secured claims, which of course we have to leave out in our computation of the unsecured creditors for the purpose of having counsel examine the file so that I can exhibit it to the witness——

The Court. Can you state whether they are approximately the same as that shown in the petition schedules?

Mr. Margolis. Schedules—that, I don't know without checking, Your Honor. Often times in the matters creditors phone in to inquire what possible assets are in a certain case and won't go to the trouble or expense of a Notary fee to prepare a claim. These claims came into the clerk's office; there are 41. There may be one or

two more secured claims. There are, however, sufficient unsecured claims to my knowledge to establish the percentage theory which we allege is one of the elements and with which there is no dispute.

Mr. Berger. I don't know what he means by dispute, I don't know if it is a disputed fact. I haven't gone into the matter. I feel from our evidence we will prove that they were not even entered, and don't have any point in going into these claims, but I can't see—I don't dispute them; however, it is assumed I must dispute them. I don't know anything about them, I haven't seen them until now. However, to save the time of the Court, if the Court desires to admit them, giving me a chance later——

The Court. Yes, you may do that, and I should like, before we close the case to know the total, have a total run.

Mr. Margolis. I will undertake to do that, Your Honor, and I might add if counsel is correct in part, as we have stipulated at the beginning of the case, the only issues is the questions of insolvency of the corporation and the knowledge by the defendants and this attempt to offer these claims, merely information for the Court. However, if they are immaterial they will be disregarded. If Your Honor wishes to know the amount I will run a total and counsel can check it and I will offer it to the Court at the afternoon session.

The Court. After the noon recess give me a total.

Mr. Margolis. Yes.

Q. The schedules which you hold show indebtedness in excess of \$40,000, the schedules you hold in your hands, unsecured creditors?

A. Yes, sir.

Q. And the assets which you have told us about comprise these accounts receivable, and you mentioned something about some personal property which was mortgaged, and did the corporation receive any equity out of the sale of that property?

A. No, sir, you mean the plant and the equipment?

Q. That is correct.

A. No, it did not.

The Court. On any real estate?

A. No, sir, it was all machinery and office equipment.

Q. (by Mr. Margolis). The corporation didn't own any real estate?

A. No, sir.

Q. No stocks or bonds?

A. No, sir.

Q. And did the condition of the corporation between September 12 and the date of the filing of the involuntary petition on November, I believe it was the 9th—

The Court. November 9th.

Q. November 9, get better or worse?

Mr. Berger. Just a moment. If Your Honor please, that certainly is calling for a conclusion unless some proof either by books or records, as to whether they got better or worse. Merely a statement, a bald statement without any foundation whatsoever—I will object to that statement.

Mr. Margolis. It seems to me if the witness was an active operator of the business, Your Honor, he would be one who would know whether the business improved or whether it didn't.

The Court. Ask him generally what the condition of the business was on September 12.

Mr. Berger. The point in issue, Your Honor, would be that in September of 1949, but not in November as to whether it changed or not, because the books themselves would disclose that.

The Court. He may state on September 12, 1949, what was the condition of the business, approximately what were the assets, liabilities and so forth.

Q. (by Mr. Margolis). Will you answer the question?

A. The situation of the corporation on September 12 was just about the same as it was in this.

Q. As set forth in the schedules?

A. Yes.

Mr. Berger. I move to strike out the answer as not responsive.

The Court. I will allow that in. He stated on November 12, what the condition was. He says as President of the corporation that on September 12 it was in approximately the same condition.

The Witness. I would say the only change was some labor. We weren't paying our labor in that period, and got slightly worse because of the labor, by buying everything on COD, on a COD basis.

The Court. Weren't paying your labor?

The Witness. No.

The Court. You mean you didn't keep up with your wages?

A. That is right, sir.

Q. (by Mr. Margolis). And why didn't you pay your labor?

A. We didn't have the money.

Q. Now, do you know Mr. Norberg who is sitting here in the Courtroom?

A. Yes, sir.

Q. And can you tell the Court when you first met Mr. Norberg?

A. I first met Mr. Norberg in what we call the Lakeside Store on Ocean Avenue.

Q. Could you tell us the date, approximately?

A. About the 8th of September.

Q. Of 1949?

A. 1949, right in there. It was a Saturday.

Q. Who was present at that meeting?

A. Mr. Norberg, Miss Lee, who is in the courtroom.

Q. She was an officer of the corporation?

A. Yes, sir.

Q. Yourself and Mr. Norberg?

A. Yes, sir.

Q. Can you tell the Court the reason for Mr. Norberg's visit or invitation to the Lakeside place of the bankrupt corporation?

A. I think——

The Court. Mr. Margolis, isn't it the rule of this Court that counsel stand?

Mr. Margolis. I beg your pardon; I am sorry.

Q. Go ahead.

A. Mr. Norberg phoned me in the morning. He said he wanted to have a talk with me, and I said, well, we could talk if he wanted to come up

on a Saturday afternoon. He said, I will come right up, and he came up and I had some facts and figures at my disposal there.

Q. Did he tell you what he wanted to come up about?

A. Told me he wanted to come up about KJBS indebtedness.

Q. Yes. And he came out to the place on Lakeside Street?

A. Yes.

Q. How long a time did he spend there?

A. Well, we had a long chat, probably half hour, twenty-five minutes, half hour.

Q. Can you tell the court what you said and what Mr. Norberg said in response to your statements and vice versa?

A. Mr. Norberg was very cooperative with me and we went over—I had a financial statement, I went over the financial statement and the conditions of the corporation with Mr. Norberg. I explained to him what our difficulties were, that we were seeking new capital and we had a couple of good prospects to come in with us and if the people we owed money to would go along with us we might be able to pull it out, but if we didn't we weren't to get any new capital we couldn't pay anyway. And Mr. Norberg was cooperative and I gave him all of the information that I had, explained the situation about the stores, they weren't doing well and although it looked like we had some accounts receivable some of them were uncollectable and that we were just in bad shape if we didn't get this new capital in.

Q. And what did Mr. Norberg say in response to your explaining to him what the situation was from this financial statement, if you can tell us?

A. Mr. Norberg didn't comment very much, more or less listened to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

A. Well, the main theme of the conversation, as I was explaining to Mr. Norberg the serious condition of the corporation and the figures.

Q. Did you discuss with him the financial condition of the corporation at that time?

A. Yes, I had the financial statement with me.

Q. And did you go over it in detail, the items set forth in the financial statement?

A. Yes, we did, I went over with him——

Q. And what if anything did he say at the conclusion of that conference?

A. Well, the best of my knowledge he said he didn't know what he was going to do. My efforts with Mr. Norberg were to try and convince him that there was no value in starting an action, if he did something like that it would ruin our chances to get new capital, and there was no decision made by Mr. Norberg at that meeting.

Q. Did you discuss with him that you were having financial difficulties at that time?

A. Yes, we were definitely.

Q. And you told him all the details in connection with the business?

A. It was common knowledge. Even KJBS, his client, had been talking with us.

The Court. Yes, he could see what was coming.

Q. Yes. Just tell us, you stated to Mr. Norberg at that time with respect to the financial condition of the corporation and enumerated that it is common knowledge?

A. Yes, I went over it with great detail with Mr. Norberg.

Q. And he left after you had about a half hour's conference?

A. Yes.

Q. Within a few days this attachment suit was brought?

A. Yes.

Q. Did you have any discussions or conferences with Mr. Norberg after the attachment?

A. Yes, Mr. Norberg closed up two of our stores. He worked closely with a Mr. Kolb.

Mr. Berger. I move to strike the answer as not responsive to the question, any other conferences with Mr. Norberg after that time, only confine himself to the question.

The Court. I don't think—he says that he closed the stores by this attachment and worked through Mr. Kolb, the attorney." (T. 24-34.)

* * * * *

"Q. Who is Mr. Kolb? He is an attorney?

A. He is an attorney.

Q. Representing a creditor?

A. Yes, Pacific Mechanical and Electrical Company.

Q. What?

A. Pacific Mechanical and Electrical Company.

Q. One of the creditors listed in the schedules?

A. Yes, sir." (T. 35.)

* * * * *

A. Mr. Norberg didn't comment very much, more or less listened to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

A. Well, the main theme of the conversation, as I was explaining to Mr. Norberg the serious condition of the corporation and the figures.

Q. Did you discuss with him the financial condition of the corporation at that time?

A. Yes, I had the financial statement with me.

Q. And did you go over it in detail, the items set forth in the financial statement?

A. Yes, we did, I went over with him——

Q. And what if anything did he say at the conclusion of that conference?

A. Well, the best of my knowledge he said he didn't know what he was going to do. My efforts with Mr. Norberg were to try and convince him that there was no value in starting an action, if he did something like that it would ruin our chances to get new capital, and there was no decision made by Mr. Norberg at that meeting.

Q. Did you discuss with him that you were having financial difficulties at that time?

A. Yes, we were definitely.

Q. And you told him all the details in connection with the business?

A. It was common knowledge. Even KJBS, his client, had been talking with us.

The Court. Yes, he could see what was coming.

Q. Yes. Just tell us, you stated to Mr. Norberg at that time with respect to the financial condition of the corporation and enumerated that it is common knowledge?

A. Yes, I went over it with great detail with Mr. Norberg.

Q. And he left after you had about a half hour's conference?

A. Yes.

Q. Within a few days this attachment suit was brought?

A. Yes.

Q. Did you have any discussions or conferences with Mr. Norberg after the attachment?

A. Yes, Mr. Norberg closed up two of our stores. He worked closely with a Mr. Kolb.

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“Q. Who is Mr. Kolb? He is an attorney?

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Q. One of the creditors listed in the schedules?

A. Yes, sir.” (T. 35.)

* * * * *

On cross-examination this witness testified:

“Q. Now, the list of unsecured creditors that you had, that you talked about, was that the same list that was unsecured in October, in September of 1949, or November, which? Do you know off-hand, or without referring to your books?

A. The list was primarily, it was the same with the exception of an accounting bill that was to come in, and an attorney bill that was to come in and some additions in labor. Aside from that it was the same.

Q. Yes. When did you go on a C.O.D. basis, Mr. Loudolph, with the various creditors that you had?

A. Sometime in August.

Q. In August. Up to that time——

A. We put our stores on a C.O.D. basis and then we paid on a C.O.D. basis. We didn't give the store any more credit.

Q. Then you were on a C.O.D. basis with your creditors?

A. Yes, sir.

Q. When was that?

A. In August.

Q. You did that voluntarily?

A. No, began to get behind.

Q. Yes.

A. Only way we could get our materials.

Q. Now, you stated that your liabilities were the same, approximately the same in September as in November?

A. Yes, sir.

Q. And that with the exception that you didn't pay for the salaries in November?

A. Yes, and the exception that we had, that accounting bill still due and the attorney work.

Q. And didn't you——

A. Some smaller ones.

Q. Didn't you withdraw from your cash fund the same amount of money, at least don't your books show that you withdrew from your account fund the amount of the salaries you should have been paying to the employees?

A. Stopped salaries in July, took no salaries, the offices took no salaries after July.

Q. The salaries you referred to were the officer's salaries?

A. No.

Q. What were the salaries you were referring to?

A. I am referring to the driver and the girl in the office.

Q. Was the driver a member of the corporation?

A. No, sir.

Q. Was the girl in the office?

A. No, sir.

Q. Did they get paid since July?

A. Small amounts, but there is still a balance owing to them.

Q. And you did not deduct that, the amount of monies due them, those two only, from your cash fund?

A. No, we paid them as we could, gave them sometimes, gave them \$50 on account of their salary, paid as we could and when we had to close we owed them approximately \$400 each.

Q. Coming back to the conversation that you first had with Mr. Norberg when he called upon you in September, you showed him the financial statement at that time, did you?

A. Yes, sir.

Q. You are positive of that?

A. I am, I had it right there.

Q. And did you go over it thoroughly with him?

A. Yes, sir.

Q. Did you tell him at all that you were expecting new capital to come in?

A. Yes, sir.

Q. And did you tell him where you were going to get new capital?

A. I don't know. We were working with a man named Pate.

Q. He was a man who used to call on you and he was anxious to come in with you?

A. The main reason I brought up that with Mr. Norberg, I told him he would make our chances very slight if an action was put on at this time.

Q. Slight for what?

A. To get additional capital that would put us on our feet.

Q. Did you mention anything at all about getting a loan from R.F.C.?

A. Yes, sir, we were working with our R.F.C.—probably came out in the conversation.

Q. Probably did—what happened?

A. We didn't get it.

Q. Did you make application for it?

A. Yes, an application in the sense that I had about four conferences—they don't take applications in the R.F.C. unless it is going to go through, but they talk with you. I had the Pacific National Bank introduce me, but I had

quite a few conferences with the R.F.C. but they didn't think that it was worth while to put in an application.

Q. In other words, your business was too small for them to invest in?

A. I don't think it was a matter of size, it was just that the statement didn't look good enough.

Q. Is that the same financial statement you are talking about?

A. Yes, sir.

Q. The same one you showed to them?

A. Yes, sir. (T. 47-50.)

This testimony plainly measures up to the definition of "insolvent" contained in Section 1(15) of the Bankruptcy Act (11 U.S.C.A., Sec. 1(15).)

(b) The transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

In the previously quoted finding (4) the trial Court found "That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 12.)

The issue of "reasonable cause" was essentially one of fact for the trial Court as the trier of fact, including the facts proved and all reasonable infer-

ences that might be drawn therefrom, and as there was substantial evidence to support his findings on the subject they must be accepted as conclusive on appeal. (*Kaufman v. Tredway*, 105 U.S. 271, 25 S. Ct. 33, 49 L. Ed. 190; *Pyle v. Texas Transport etc. Co.*, 238 U.S. 90, 35 S. Ct. 667, 59 L. Ed. 1215; *Remington on Bankruptcy*, Vol. 4-A, Sec. 1707.) That the trial Court as the trier of fact had broad power to sift the evidence and determine the credibility of the witnesses who appeared before him, is undeniable. (*Quock Ting v. United States*, 140 U.S. 417, 420-1, 11 S. Ct. 733, 734-5, 35 L. Ed. 501, 502.)

The secretary of bankrupt corporation gave this testimony:

“Q. And you knew that the amount of this claim that Mr. Norberg came out to collect, as you have told us, was past due for some time?

A. Yes.

Q. Will you tell the Court substantially what occurred in that meeting when he came out; what you said to him and what he said to you?

A. Well, he asked me about the condition, the financial condition of the company. I told him that we were in financial difficulties, we didn't have the money, wanted to pay our creditors, but weren't able to. So he said what do you want us to do about it? I told him at the present time we were working very hard with a number of parties seeking additional capital.

Q. Yes; did he ask you any questions?

A. He asked also if they were the only ones we owed money to. I said no, there were nu-

merous ones. He also asked if they were the largest or the smallest, and I said we had many larger and many smaller. And he asked how we intended to take care of our obligations, and I felt that we were really in a very serious condition, didn't have the money to pay them and we were working, trying to get additional capital.

Q. You told him that?

A. Yes.

Q. What did he say?

A. He seemed to be very conscientious and asked what other assets we had, whether we had stores that owed the company any money or not, and I said yes, they did, because I for myself owed money, the Lakeside, and I know I owed money, but I couldn't pay because we were just starting the business and we were overly hopeful and we just kept getting behind.

Q. You had a franchise from the corporation and you were operating the store?

A. The Lakeside store was mine.

Q. This conversation took place——

A. The first conversation when I met him, yes.

Q. Anything else said at that time by you and by Mr. Norberg, and if so, tell it to the Court.

A. He asked whether there were other creditors. I said there were, so he said what do you intend to do about that and I said we had to get additional capital and then would give them a certain payment and the rest have to be on a payment plan. He said he wasn't interested in other companies, interested in his own, just collecting for his one client.

Q. How long did this conversation take place?

A. There were interruptions, because I was working at the store myself and when the customers came in I had to stop, but I would say the conversation, I would say that he was there for at least twenty minutes." (T. 116-118.)

Appellants urge that the witness, Mr. Theodore A. Kolb, an attorney at law, whom they produced, and "who had some dealings with defendant corporation after the attachment was levied and before the petition in bankruptcy was filed" (App. Op. Bf. p. 3), testified to certain conversations which occurred "after the attachment had been issued and levy made" (App. Op. Bf. p. 3). The evidence referred to by appellants was produced by them.

Appellants' contention that Mr. Kolb "had some dealings with defendant corporation" (we assume what is meant, is bankrupt, and not defendant) "after the attachment was levied" is misleading and not in accordance with the record. The witness had dealings with bankrupt corporation more than sixty (60) days "prior" to the transfer in question, namely, correspondence between the witness who represents Pacific Electrical and Mechanical Company, a creditor of bankrupt, and the bankrupt, attempting to collect a claim against bankrupt and the filing of a suit to enforce this claim on August 2, 1949, more than forty (40) days prior to the transfer in question. (T. 69-75.) The witness at this time knew that the bankrupt corporation was defendant in a suit brought by an accounting firm for

the recovery of \$5,000.00 (T. 82), not \$500.00, as perhaps inadvertently mentioned by appellants (App. Op. Bf. 4). The witness further testified that his clients insisted he proceed to judgment on the suit brought on their behalf on August 2, 1949, "but would hold off execution if satisfactory arrangements are made."

"The Court. What do you mean by satisfactory arrangements?

The Witness. Payment of security.

The Court. Payment of security?

The Witness. Or his situation work itself out in such a way they could see their way clear of certainty of payment.

Q. Go ahead.

A. Especially keeping in mind it takes some time to obtain a judgment in the event that the discussions at that time would not culminate in satisfactory arrangements. So we proceeded—as a matter of fact, I remember the attorney for Mr. Loudolph and Brick O'Gold Corporation stipulated to a judgment in the matter. He felt it was useless to enter an answer in the matter and a judgment was entered.

Mr. Margolis. I move what he felt be stricken, Your Honor.

The Court. Well, I will strike out what he felt. As a matter of fact, as a result of your conferences with your client you both allowed your account to ripen into a judgment?

The Witness. That is correct.

The Court. Not satisfied with the situation?

The Witness. Weren't satisfied, largely because Mr. Loudolph's slowness in answering com-

munications and inability of getting a hold of him, and the fact he made appointments and didn't keep them quite frequently. Our clients felt they wanted to have something stronger than just Mr. Loudolph's word. He made promises and didn't keep them, however, whenever he did appear.

The Court. Isn't an unusual course, a debtor corporation trying to keep his head above water.

The Witness. It is the usual situation if you are short of cash.

The Court. You mean your clients weren't satisfied with the efforts and wanted either cash money, security, or a judgment, isn't that correct?

The Witness. That is correct. We weren't satisfied with the efforts on the part of Mr. Loudolph, and our clients wanted Miss Lee in the picture and rather have her run the show than Mr. Loudolph, because from certain checks that they had made on the situation they weren't satisfied with Mr. Loudolph's management of the corporation, they wanted Miss Lee to take over and felt the only way to do that would be if Miss Lee was in active control of the business, not Mr. Loudolph.

Q. You mentioned that judgment was stipulated to?

A. That is correct, judgment stipulated to. When the attorney for Brick O'Gold assigned a stipulation and judgment entered upon the stipulation, he stated that he had no defense to the action and it was useless for him to enter an answer in the matter, so stipulated to judgment and judgment was entered.

Mr. Margolis. May I interrupt, please? Do you have the stipulation, sir, on the judgment? All of those matters become important, as I will demonstrate a little later, and like to get the chronology here, Your Honor.” (T. 82-84.)

With respect to the testimony of this witness relating to conferences and conversations at his office “subsequent” to September 12, 1949, the date of the transfer in question—this evidence was likewise produced by appellants. Accordingly, appellee’s case does not in any sense depend upon this testimony of the witness, Mr. Kolb, and furthermore the trial Court was under no obligation to either believe or consider this testimony. With respect to the testimony of this witness concerning events “prior” to the date of the transfer, since appellants offered this testimony, it is respectfully submitted, they are bound by it. Hence, where the District Court finds an issue against an appellant, the Appellate Court will consider only the evidence which will support the trial Court’s judgment. (*Knoblick v. Temple*, 7 Cir., 1947, 159 F. (2d) 197.)

Appellant Norberg, on cross-examination, testified he was a member of Central Credit Reporting Bureau, that is owned by several collection agencies; that his office number with that agency is 21; that the agency supplies its members with information regarding pending suits against a debtor; that immediately upon receipt of an account for collection it is sent to the bureau and in return within three or four days the sender gets back the information

indicating any suits which are pending against a debtor; that presuming the claim concerning the instant controversy went to the bureau on Friday, September 9, 1949, the information requested would be received within three or four days. (T. 165-168.) This information, which is set forth and attached to what is designated as a "suit card," Appellee's Exhibit No. 6, and consisting of three cards, reveals the suit brought by the witness Mr. Kolb for his client on August 2, 1949 for \$1,401.00, another on August 8, 1949 for rent in the amount of \$1,200.00, and a third on August 20, 1949 for \$334.00 for money. In addition there are two additional suits, subsequent to September 12, 1949, with which we are not concerned.

Section 60 of the Bankruptcy Act (11 U.S.C.A., Sec. 96) does not require that a creditor have actual knowledge that his debtor is insolvent, and subdivision (b) thereof specifically provides that a preference may be avoided if the creditor "or his agent acting with reference thereto" has reasonable cause to believe that the debtor is insolvent. And it is a general rule that "notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose." (*Grandison v. National Bank of Commerce*, 2 Cir., 1916, 231 F. 800, 809; *Security-First Nat. Bank of Los Angeles v. Quittner*, 9 Cir., 1949, 176 F. (2d) 997, 1000.)

In view of the circumstances disclosed by the testimony quoted under this subdivision it certainly cannot be said that the findings to the effect that the transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent are "clearly erroneous."

2. THE CONTENTION THAT THE JUDGMENT FIXED THE VALUE OF BANKRUPT'S ASSETS AT THE TIME OF THE ADJUDICATION INSTEAD OF AT THE TIME OF THE PREFERENCE IS WITHOUT MERIT.

The record discloses bankruptcy intervened upon the filing of an involuntary petition on November 9, 1949, on which the order of adjudication was made and entered on November 28, 1949. (Exhibit No. 5.) In the previously quoted finding (3) the trial Court found "That within four (4) months next preceding the filing of said involuntary petition in bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O'Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O'Gold, a corporation, bankrupt, * * *" (T. 11.) It is obvious that no mention is made of the date of adjudication. Similarly, finding (4) wherein the trial Court found "That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the

enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 12), is devoid of any reference to the date of adjudication.

In speaking of the time of evaluating a debtor's assets, it was said in *Palmer Clay Products Co. v. Brown*, 1935, 297 U.S. 227, 228, 56 S. Ct. 450, 451, 80 L. Ed. 657:

"Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but the actual effect of the payment as determined when bankruptcy results."

Under somewhat similar circumstances the foregoing holding was followed by the Seventh Circuit, in *Canright v. General Finance Corporation*, 1941, 123 F. (2d) 98, 100.

Appellants complain that appellee did not sustain the burden of proving that "the person receiving the payment or to be benefited thereby had reasonable cause to believe that it was thereby *intended to be given a preference*." (App. Op. Bf. 16.) The holding upon which appellants rely is from a decision of the Fifth Circuit in 1908. This is not the law, for since 1910, the "debtor's actual intent" has not been an essential element in the determination of

a preference. (*Collier on Bankruptcy*, 14th Edition, Vol. 3, 769; *Richardson v. Germania Bank of City of New York*, 2 Cir., 1919, 263 F. 320, 322.)

3. THE SUBSTANTIAL RIGHTS OF THE APPELLANTS WERE NOT AFFECTED BY THE INTRODUCTION OF THE BANKRUPTCY SCHEDULES.

Appellants' "point" captioned, "The Bankruptcy Schedules Were Improperly Admitted In Evidence" (App. Op. Bf. p. 17) concerning the introduction of the file of the bankruptcy proceedings, including the bankrupt's schedules, is prefaced by the alien statement, "Obviously an objection to the introduction of said schedule would have been of no avail." (App. Op. Bf. p. 6.) No point of that character is suggested in the "Concise Statement of Points" relied upon by appellants, and filed by appellants under Rule 19, subdivision 6, of this Court. (T. 212-213.) Reply to this alien statement is therefore unnecessary.

The "point" consists in a quotation from *Remington on Bankruptcy*, 4th Ed., Section 2260, to the effect that "the schedules of the bankrupt are inadmissible against a transferee," and the quotation from a case there cited in support of the text. (App. Op. Bf. p. 17.) The concluding section of Remington's said Section 2260 is omitted by appellants. It reads:

"But due objection to their admission must be made at the time, else the objection is waived."

And said concluding sentence is fully supported by the case there cited, to-wit, *Olsey v. Adams*, 5 Cir., 268 F. 114, 116.

The manner in which appellants present the foregoing "point" demonstrates the advisability of requiring strict observance of Rule 20, subdivision 2(d), of this Court concerning specification of error. Observance of the rule would have required appellants to "quote the grounds urged at the trial for the objection and the full substance of the evidence admitted." When reference is made to the record it will be found that not only was no objection made to the introduction of this evidence, but appellants sought and obtained information therefrom. (T. 135.)

Finally appellants cross-examined an officer of bankrupt corporation in connection with part of the bankruptcy records of which the schedules were a part, as well as the schedules. (T. 43-44, 55-56, 59.) It therefore follows that even if it be assumed that the trial Court should not have admitted the schedules, it cannot be said that any substantial rights of the appellants were thereby affected.

4. **THE JUDGMENT OF THE TRIAL COURT WAS SOUND IN LAW AND SOUND IN FACT AND THEREFORE SHOULD BE AFFIRMED.**

It was said in *In re Penfield Distilling Co.*, 6 Cir., 1942, 132 F. (2d) 694, at page 694:

"Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed

by the district judge, will not be set aside, on appeal on anything less than a demonstration of plain mistake.”

In *Security-First National Bank of Los Angeles v. Quittner*, 9 Cir., 1949, 176 F. (2d) 997, it was said at page 999:

“But where the evidence is such that different conclusions are warranted, the determination of the question here involved is essentially one for the trial court. For even where there is no doubt or controversy as to what facts came to the attention of the creditor, the question as to whether he acted reasonably in making no further inquiries, in short, whether he had reasonable cause to believe the debtor insolvent, is generally a question of fact.”

And in *Goldstein v. Polakof*, 9 Cir., 1943, 135 F. (2d) 45, where the Court stated at page 45:

“Recitation of the evidence follows in the brief and we have given it close attention. There is, however, nothing before us but a request that we try the case de novo on the record. It is true that appellant states in each of his ‘Specifications of Errors’ as to the court’s findings that ‘the finding * * * is against the weight of and not supported by the substantial evidence.’ But in each instance the issue turns upon the trial court’s conclusion from substantial documentary evidence together with highly conflicting testimony of witnesses relating thereto.

Suffice it to say that, applying Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, in giving ‘* * * due regard * * * to

the opportunity of the trial court to judge of the credibility of the witnesses.', we do not find the trial court's findings of fact 'clearly erroneous.' "

On the record, it is clear that the judgment of the District Court is sound in law and sound in fact, and appellee therefore respectfully submits that the judgment should be affirmed.

Dated, San Francisco, California,

August 8, 1951.

MAX H. MARGOLIS,

JAMES M. CONNERS,

Attorneys for Appellee.

No. 12,747

**United States Court of Appeals
For the Ninth Circuit**

J. R. NORBERG, an individual doing
business as Norberg Adjustment
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B. DOLPH, ALICE HUSTON LEWIS,
HELEN S. MARK, ELIZABETH N.
BINGHAM, D. WORTH CLARK, EDWIN
P. FRANKLIN, GLENNA G. DOLPH,
individually and doing business as
copartners under the firm name and
style of KJBS Broadcasters,

Appellants,

VS.

PAUL W. RYAN, Trustee of the Estate
of Brick O'Gold (a corporation),

Appellee.

**Appeal from a Judgment of the United States District Court
for the Northern District of California, dated
August 9, 1950 and filed August 9, 1950.**

APPELLANTS' PETITION FOR A REHEARING.

WILLIAM BERGER,
995 Market Street, San Francisco 3, California
*Attorney for Appellants
and Petitioners.*

JAN 24 1951



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*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The decision of this Court seems to be predicated in part upon the point that the appellant had reasonable cause to believe that the corporation was insolvent on September 12, by reason of the fact that on said date the appellant was informed that the corporation was on a C.O.D. basis with its creditors, and also that the financial statement of the corporation had not been seen by the appellant until seven days after the aforesaid date. Appellant feels that such finding of the trial Court, which finding has been affirmed by this Court, is "clearly erroneous" under the Court rule, cited in the Court's opinion. It is not the appellant's desire or intention to reiterate any of the argument heretofore presented, but a casual reading of the reporter's transcript shows an erroneous assumption by the trial Court, and what appears also to be a confusion on the part of the trial Court.

One of the witnesses for the appellant, a Mr. Kolb, an attorney at law, did not appear into the picture until approximately ten days after the writ of attachment was levied, and the Court seemed to be confused in thinking that Mr. Kolb was counsel for the appellant, as during the testimony of Mr. Ludolph, the Court seemed to have that assumption, as stated on page 34—"He says that he closed the stores by this attachment and working through Mr. Kolb, the attorney."

Mr. Kolb had knowledge of the financial condition of the bankrupt several months prior to the writ of attachment, but this was not at all known to the appellant, and in fact Mr. Ludolph did not even inform the appellant at the time he visited him on September 9, a Friday, that there was a Mr. Kolb already attempting to collect money. Therefore, how could Mr. Kolb's testimony have any bearing on the issue if the Court was not so confused. The testimony of both Mr. Ludolph and Miss Lee indicated that when the appellant called upon Mr. Ludolph on September 9, he was shown a financial statement, but at no time during the conversation on September 9 or 10, was Mr. Norberg told by either Mr. Ludolph or Miss Lee that the corporation was insolvent, and in fact was informed that all they needed was additional cash, and they would then be able to pay their bills, that they were at that time "strapped for cash". Mr. Ludolph and Miss Lee's testimony to such effect appears on pages 32, 49, 117, 128, 129, 131, and 132. Miss Lee reiterates the financial condition of the company to Mr. Norberg when she told him that "We told him we were sound, but needed time" (Tr. p. 132).

For the purpose of the argument, we will discount any and all testimony offered by the appellant as to what occurred during the time of September 9 and 10, and also the testimony of Mr. Kolb, wherein both Mr. Ludolph and Miss Lee admitted that the corporation was solvent (Tr. pp. 81, 82, and 98).

It follows that, if the corporation was solvent on September 9 or 10, they were certainly solvent on

September 12, the date of the attachment, as it is admitted by the record that the condition of the corporation did not change in any respect from the time the financial statement was prepared in July until long after the writ of attachment was levied.

As hereinabove pointed out, Mr. Ludolph states that he showed the appellant the financial statement on September 10, which in and of itself is further proof, disregarding anyone's testimony, that such financial statement showed liabilities of \$64,000 and assets over \$94,000. The very fact of showing such statement to appellant would be for one purpose only and that would be to assure a creditor that he would be paid, as their financial condition was sound. The additional testimony on the part of Mr. Ludolph that they were on a C.O.D. basis certainly does not mean that they were insolvent, as a C.O.D. basis merely means a method of operation in paying bills.

Questions involved:

1. Does a C.O.D. basis mean that the corporation is insolvent?
2. Was the corporation insolvent on September 12, 1949?

The Court's attention is once more directed to the cases heretofore cited in appellant's opening brief and particularly to the following cases:

Gray v. Little, 97 Cal. App. 442, at page 446:
 "The fact, alone, that a creditor knows his debtor to be financially embarrassed and is pressing for a payment of his claim, is not sufficient to charge

him with having reasonable cause to believe his debtor to be insolvent. Mere suspicion that the debtor may be insolvent is not sufficient to render payments received by a creditor voidable as preference, but he must have such knowledge of facts as to induce a reasonable belief of insolvency."

In re Salmon, 249 Fed. 300:

Facts: Debtor complained of being in financial difficulties.

Held:

"The law is well established that, even if the creditor entertains doubts concerning solvency of the debtor, it is not enough. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the judgment will give him preference."

In re Wolf Co., 164 Fed. 448:

Facts:

"It was plain that the company was in embarrassed circumstances. Its debts were known to be large, its operation extended, and some of them, at least, unprofitable, and new capital was needed to carry on the business."

Held:

"A creditor of a bankrupt, who is put on inquiry as to the solvency of the debtor, was not for that reason charged with notice of facts which could only be learned from intimate and inaccessible sources, such as the books of the bankrupt."

Stucky v. Masonic Savings Bank, 108 U.S. 74:

Held:

“A creditor, dealing with a debtor, whom he may suspect to be in failing circumstances, but of which he has not sufficient evidence, may receive payment without violating the law. He may be unwilling to trust him further; he may feel anxious about his claim; yet such belief as the Act requires may be wanting.”

Valley National Bank v. Westover, 112 Fed. (2d) 61:

Facts: The bank knew that the bankrupt was delinquent on another claim. And it had refused earlier to make the debtor a loan, but only because the requested loan was considered too large for the capitalization of the bankrupt.

Held: The lower Court held for the trustee. Judgment was reversed.

It is stated in 8 Corp. Jur. Sec. 488:

“Mere fact that the books show that the debtor operated at a loss over a period of time does not prove an insolvency during that time.”

From the foregoing, and for the sake of argument, and the following line of reason, as set forth in this Court's decision, the Court must then base its decision upon the testimony of Mr. Ludolph and Miss Lee, which occurred on September 9 and 10, and at no time during those two days or either of them was there anything said to the appellant nor was he informed in any way that the corporation was in an

insolvent condition other than that they were on a C.O.D. basis. Appellant was then also informed that they did not have in their possession at that time sufficient money to pay the appellant the sum of \$1029.00. It is very elementary and appellant feels that he needs no citation of authority, that merely because a corporation, the size of the bankrupt herein, does not have in its till \$1029.00 on a given date, and that they do not have enough cash and are put on a C.O.D. basis, that such fact in and of itself shows that they are insolvent, particularly where a financial statement is given such creditor for the purpose of having him wait for his money; otherwise he would have no purpose in giving such statement to the creditor.

It is therefore respectfully submitted that a reconsideration be given of this matter, and that, because of the confusion existing on the part of the trial Court, and the lack of evidence to support the trial Court's ruling, such decision be reversed.

Dated, San Francisco, California,
January 21, 1952.

Respectfully submitted,

WILLIAM BERGER,

*Attorney for Appellants
and Petitioners.*



CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 21, 1952.

WILLIAM BERGER,
*Counsel for Appellants
and Petitioners.*





